Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA *EX REL.*
MARY C. McKENZIE,

Petitioner,

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.,
d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The False Claims Act, 31 U.S.C. §§ 3729-3733 (1994), provides that no court shall have jurisdiction over a *qui tam* action brought on behalf of the United States by a private relator where the action is 'based upon' certain public disclosures, (31 U.S.C. § 3730(e)(4)(A)), and the relator is not an 'original source' of the information on which the suit is based. *Id.* at § 3730(e)(4)(B). The quoted terms have been the subject of sharply conflicting interpretations by the United States Courts of Appeals.

The questions presented are:

1. Whether certiorari should be granted to resolve the conflict among the federal courts of appeals regarding the meaning of 'based upon' as used in 31 U.S.C. § 3730(e)(4)(A) (1994).

2. Whether certiorari shall be granted to resolve the conflict among the federal courts of appeals regarding the meaning of 'original source' as used in 31 U.S.C. § 3730(e)(4)(B) (1994).

PARTIES TO THE PROCEEDING

Petitioner Mary C. McKenzie brought an action, *United States ex rel. McKenzie, McKenzie v. BellSouth Telecommunications Inc., d/b/a South Central Bell Telephone Company*, No. 3:94 cv-730 (filed December 13, 1994). She asserted *qui tam* and individual claims under the False Claims Act (31 U.S.C. §§ 3729-3733) (1994), before the United States District Court for the Eastern District of Tennessee. The United States declined to intervene. There were no other intervenors or amici. Petitioner McKenzie was the only Appellant before the United States Court of Appeals for the Sixth Circuit. Petitioner McKenzie is the only petitioner before this Court.

Respondent, BellSouth Telecommunications, Inc., provides telephone service to customers in the States of Tennessee, Alabama, Mississippi, Louisiana, and the Commonwealth of Kentucky, doing business as South Central Bell Telephone Company. Respondent was the Defendant in the District Court proceedings of this case and the Appellee before the United States Court of Appeals for the Sixth Circuit.

There are no other parties to this action.

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OPINIONS BELOW

On August 26, 1997, the United States Court of Appeals for the Sixth Circuit issued its opinion in *United States ex rel. McKenzie, McKenzie v. BellSouth Telecommunications, Inc., d/b/a South Central Bell Telephone Company*, 123 F.3d 935 (6th Cir. 1997), affirming in part and reversing and

remanding in part the decision of the United States District Court for the Eastern District of Tennessee, No. 3:94 cv-730, slip op. (E.D. Tenn. February 23, 1996). The opinions of the Court of Appeals and the District Court are reproduced in the Appendix ("App.").

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Sixth Circuit entered on August 26, 1997 affirming the lower court's dismissal of her *qui tam* action brought on behalf of the United States pursuant to the False Claims Act. 31 U.S.C. § 3729-3733 (1994). Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1)(1994). A petition for Writ of Certiorari intended to bring any judgment in a civil action before this Court for review shall be taken within ninety days after the entry of such judgment. 28 U.S.C. 2101(c). This Petition for Writ of Certiorari is timely.

STATUTE INVOLVED

The statute involved is 31 U.S.C. § 3730(e)(4)(A) and (B). It provides:

(e) CERTAIN ACTIONS BARRED--

. . . .

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the

Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

I. Nature Of The Case And Proceedings Below

This civil action arises under the False Claims Act, 31 U.S.C. §§ 3729-3733 (1994) ("the Act"). In October, 1994 counsel for Petitioner McKenzie, acting pursuant to her instructions, contacted the United States Attorney's Office in Knoxville, Tennessee and revealed the substance of Petitioner's knowledge of violations of the Act to an Assistant United States Attorney. The action was filed thereafter on December 13, 1994, in the United States District Court for the Eastern District of Tennessee.[1/] Acting as relator, Petitioner asserted claims on the United States' behalf under the Act's *qui tam* provision, 31 U.S.C. § 3730 (b)(1), and on her own behalf under the Act's employee-protection provision. *Id.* at section 3730(h). The case was filed under seal to allow the United States to determine whether to intervene. *Id.* at section 3730 (b)(2). Along with the complaint, Petitioner provided the United States with a disclosure statement (and supporting

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1/ The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 and 31 U.S.C. §§ 3730(h), 3732(a) (1994).

documents) detailing her knowledge about and evidence of the violations of the Act on which her *qui tam* claims were based.

The defendant was Petitioner's former employer and Respondent herein, BellSouth Telephone Communications, Inc. d/b/a South Central Bell Telephone Company ("BellSouth"). In March, 1995, the United States elected not to intervene; the complaint was unsealed and served. BellSouth moved to dismiss for want of subject matter jurisdiction and for failure to state a claim. The motions were opposed; BellSouth replied. On November 21, 1995, the District Court heard oral argument. There was no evidentiary hearing. On February 23, 1996, the District Court granted the motion to dismiss on jurisdictional grounds and denied the remaining motion as moot. A timely notice of appeal was filed on February 28, 1996.[2/]

II. Factual Background

Petitioner McKenzie was employed by BellSouth from December 1966 until March 1992, when she retired on permanent disability leave as a result of harassment by her supervisors. During most of her employment with BellSouth Petitioner served as a dispatcher for BellSouth's maintenance technicians. Her duties included receiving and processing complaints about telephone service from BellSouth's customers ("trouble reports"), dispatching repair technicians, and closing trouble reports (recording them as satisfactorily resolved).

BellSouth provides approximately half of all local telephone service in Tennessee, Kentucky, Alabama, Mississippi and Louisiana. Among its customers are many

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2/ The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291 (1994).

federal facilities, including those of the Tennessee Valley Authority ("TVA") and the Department of Energy's offices in Oak Ridge, Tennessee ("Oak Ridge"). BellSouth is required, at a customer's request, to provide refunds if a line is out-of-service for more than 24 hours ("out of service"). The exceptions to the refund rule are limited, involving only situations where: service is diminished but the line is not out of service ("service affected"); repair is not possible due to the inaccessibility of customers' premises for repair ("no access"); the out-of-service condition is reported by a BellSouth employee rather than by the customer; or the customer extends the time within which repairs may be made. *United States ex rel. McKenzie*, 123 F.3d at 937, App. 3a.

In order to avoid paying refunds to the United States and others, BellSouth regularly falsified trouble reports to make it appear that out-of-service lines were repaired within 24 hours, or that one of the exceptions to the refund rule applied. Petitioner and the other dispatchers were a critical part of BellSouth's scheme because it was they who falsified trouble reports at their supervisors' direction by: (i) misclassifying telephone lines as in service or affecting service when they were actually out of service; (ii) reporting that service was restored to out of service lines within 24 hours, when in fact it was not; (iii) reporting that repair technicians were denied access when in fact no repair technician was dispatched; and (iv) misclassifying reports of trouble on telephone lines as having initially been reported by BellSouth employees, when in fact they were made by a customer.

Petitioner was ordered to participate in or witnessed falsification schemes that were directed specifically at avoiding refunds to the United States. These included: (i) closing out Government trouble reports at the end of each day, on the false

grounds that there had been "no access" to effect the repairs, then reopening the trouble report the next morning (24 hours later) and showing the line as "out of service;" (ii) providing large Government facilities (*i.e.*, TVA and Oak Ridge) with on-site representatives, who then reported trouble reports to the dispatchers as employee-generated even though the problems had in fact been reported by the federal subscriber; (iii) closing out Oak Ridge trouble reports within two hours, even though no repair had been made, in order to avoid having to make refunds under a special contract provision that required repairs to be effected within two hours of notification; and (iv) removing and separately closing, even though no repair had been made, Government trouble reports connected with a cut telephone cable that affected a broad geographic area. Petitioner complained regularly to her supervisors about these practices. As a result of her complaints she was harassed and threatened with discharge. She was ultimately placed on permanent disability leave in 1992.

In December, 1994, Petitioner filed suit asserting *qui tam* claims on behalf of the United States and an individual retaliation claim on her own behalf. Her *qui tam* claims were asserted pursuant to section 3730 (b)(1) of the Act, based on her knowledge of the falsification of repair records relating to BellSouth's telephone lines serving federal facilities in violation of provisions of § 3729(a). Her individual retaliation claim was asserted pursuant to section 3730 of the Act.

Two lawsuits were filed prior to Petitioner's disclosures to the United States of BellSouth's violations of the Act and the filing of her complaint in this action. Press reports accompanied the two lawsuits. The first suit was filed in Tennessee by Ronald Dorris against BellSouth asserting state law claims for wrongful discharge and related torts (the "Dorris

suit"). The complaint in the Dorris suit contained allegations that employees of BellSouth falsified telephone repair records to make it appear that the company satisfied standards imposed by the Tennessee Public Service Commission. Press reports indicated that certain records were falsified in order to state that telephone repairs were made and services restored to customers earlier than they in fact were. Neither the Dorris suit nor the press reports about it indicated that fraud had been committed against federal facilities. The second suit was a *qui tam* action under the Act filed in Florida against Southern Bell, a division of BellSouth, alleging that the company had committed violations of the Act similar to those alleged by Petitioner McKenzie in the States of Florida, Georgia, North and South Carolina (the "Florida suit").

After Petitioner's complaint was unsealed and served, BellSouth moved to dismiss for want of subject matter jurisdiction. As part of her opposition to the motion, Petitioner submitted to the District Court her affidavit in which she stated that "[t]he allegations of fraud in the Complaint . . . are based on my own personal experiences as an employee of South Central Bell." There is no evidence in the record below challenging that statement.

The District Court dismissed the *qui tam* claims, granting BellSouth's motion to dismiss and holding that it lacked subject matter jurisdiction over them because in its view they were (i) based upon public disclosures about the Dorris and Florida suits, and (ii) Petitioner was not an original source of the information on which the allegations of wrongdoing under the Act were based. The District Court also dismissed the retaliation claim. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed in part and reversed and remanded in part. The Court of Appeals affirmed the District

Court's dismissal of the *qui tam* claims. The Court held that the claims were based upon the prior public disclosures about the Dorris and Florida suits, and that Petitioner was not an original source under the Act. The Court of Appeals reversed the District Court's dismissal of Petitioner McKenzie's retaliation claim, remanding it to the District Court for further proceedings.[3] This Petition raises issues with respect to Petitioner McKenzie's *qui tam* claims only; no issues regarding the Court of Appeals' treatment of Petitioner's retaliation claims are raised herein.

III. *Qui Tam* Actions Under The Act

The Act became law in 1863. Act of March 2, 1863, ch. 67, § 4, 12 Stat. 698 (1863). Its purpose was to counter widespread swindling and price gouging against the Union Army. Today, the Act stands as the taxpayers' weapon to attack fraud against the United States. The Act addresses the full spectrum of corruption, including the knowing submission of false requests for payment by the United States as well as creating false records to avoid obligations to pay money due the United States. 31 U.S.C. § 3729(a)(1), (7). Those who cheat the United States must respond in treble damages and civil penalties of up to $10,000 for each false *claim*. *Id.* at § 3729(a).

Since its promulgation, the Act has contained provisions enabling a private citizen (a relator) to sue on the United States' behalf. *United States ex rel. Stinson, Lyons Gerlin & Bustamente v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d

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[3] One member of the appellate panel dissented. The Hon. Alan E. Norris would have affirmed the District Court in all respects.

Cir. 1991). Such suits are referred to as *qui tam* actions.[4] To prompt those with knowledge of fraud against the United States to prosecute *qui tam* actions, the relator has always been entitled to a share of any judgment.[5]

The Act is aimed at cleansing sharp practice from government contracting, yet at one time it encouraged a certain rapacity in its enforcement by private-citizen relators. This became evident during the 1940s from some *qui tam* actions alleging fraud under defense contracts during the Second World War. These actions were brought by relators who had no first-hand knowledge of fraud against the United States. Their suits were based on information derived entirely from indictments brought by the United States. This practice was challenged in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). There, the Government argued that such parasitic *qui tam* actions should be barred. *Id.* at 545-46; *see also id.* at 558-59 (Jackson, J., dissenting). The Court rejected the Government's position, because the Act (as then written), did not require the relator to bring forward any fresh information drawn from first-hand experience.

Congress responded to *Marcus*, amending the Act to bar *qui tam* suits based on evidence or information in the

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[4] A *qui tam* action takes its name from the phrase "qui tam domino rege quam pro si ipso in hac parte sequitur," which means "who sues on behalf of the king as well as for himself." *Black's Law Dictionary* 1251 (6th ed. 1990).

[5] The purpose of the *qui tam* provision is to motivate citizens to report and prosecute claims of fraud "under the strong stimulus of personal ill will or in the hope of gain." *United States v. Griswold, 24 F. 361, 366 (D. Or. 1885).*

possession of the Government when the action was brought.[6] Some courts concluded that the Act as amended barred all *qui tam* suits based on information possessed by the United States, even when the relator was the one who provided the information to the Government. *E.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1106 (7th Cir. 1984) (holding that the relator which had provided the Government with information about fraud prior to bringing its action was barred from bringing suit because once the relator had disclosed the fraud, the Government possessed the information on which the suit was based).

Responding to *Dean* and renewed concern about the prevalence of fraud against the United States, Congress amended the Act again in 1986. The amendments were "aimed at correcting restrictive [court] interpretations"[7] and "encourag[ing] more private enforcement suits."[8] The legislative history reveals the finding of Congress that fraud against the Government is widespread.[9] In combating fraud (which must always be camouflaged in order to succeed), the Government needs the help of those with knowledge of it. *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1355 (D. Mass. 1988).

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[6] 31 U.S.C. § 3730(b)(4)(1982) (superseded). *See United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946) (tracing the history of the post-*Marcus* amendments).

[7] S. Rep. No. 345, 99th Cong., 2d Sess. ("S. Rep.") at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269.

[8] S. Rep. at 23-24, 1986 U.S.C.C.A.N. at 5288-89.

[9] S. Rep. at 1-3, 1986 U.S.C.C.A.N. at 5266-68.

As it had been in 1943, the 1986 Congress was concerned with stimulating meritorious *qui tam* actions while discouraging parasites (such as the relators in *Marcus* and like cases), who have no personal or independent knowledge of the violations on which their claims are based. Congress struck the balance in 31 U.S.C. § 3730(e)(4). Under section 3730(e)(4)(A), a relator may pursue *qui tam* claims that are not "based upon the public disclosure of allegations or transactions", without regard to whether the relator is an "original source" of the information on which the action is based (*i.e.*, one who has "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . ." section 3730(e)(4)(B) (defining "original source")).[10/] A relator who is an original source, may properly pursue *qui tam* claims in accordance with subsection (e)(4)(B), even where the claims are based upon publicly disclosed allegations or transactions.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted to resolve the conflict among the federal courts of appeals regarding the meaning of the term 'based upon' as used in the False Claim Act, 31 U.S.C. § 3730(e)(4)(A)

10/ By its terms, section 3730(e)(4)(A) imposes a limitation on the jurisdiction of the federal courts, ("[n]o court shall have jurisdiction ..."). Most courts (including the District Court and Court of Appeals below), view the Act's use of 'jurisdiction' in the sense of adjudicatory power. As the Court of Appeals for the Seventh Circuit has suggested, that view is incorrect. Section 3730(e)(4)(A) and the reference to jurisdiction do not curtail the sorts of disputes the federal courts may entertain. Rather, the provision only sets a limit on who may act for the United States. *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 941 (7th Cir. 1996).

The Act is clear -- section 3730(e)(4)(A) bars actions 'based upon' public disclosures of allegations or transactions. Congress' use of 'based upon' -- rather than 'similar to' or 'supported by' -- was not accidental. The election of Congress to limit *qui tam* actions based on publicly disclosed information reflects its intention to preclude those actions that are truly parasitic, *e.g.*, *Marcus*, 317 U.S. 537. In such cases, the relator cannot bring forward any new, relevant information and cannot even testify about the violations alleged.

In spite of the apparent clarity of the text and its purpose, two conflicting lines of authority have developed regarding the meaning of 'based upon.' As the Court of Appeals in this case recognized, one line of authority holds that a relator's *qui tam* action is based on publicly disclosed material only when the gravamen of the action is actually 'derived from' the prior public disclosure.[11/] Other courts interpret 'based upon' far more broadly as meaning simply 'supported by' or 'similar to.'[12/] Under this interpretation, a relator is precluded from pursuing a *qui tam* action alleging violations of the Act that are supported by information that has been the subject of a public disclosure -- even if the relator did not premise the *qui tam* action upon the publicly disclosed information.

In the first line of authority (*i.e.* 'based upon' means 'derived from'), is *United States ex rel. Siller v. Becton Dickinson Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994). There, an employee of Scientific Supply, Inc. ("SSI"), filed a qui tam suit against Becton Dickinson ("BD"),

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11/ *United States ex rel. McKenzie*, 123 F.3d at 940, App. at 9a.

12/ *Id.*

alleging that BD overcharged the Government. BD moved to dismiss, arguing that the qui tam suit was based upon a previous lawsuit filed by SSI against BD, in which SSI had outlined the fraud allegedly being committed by BD on the Government. The District Court agreed and dismissed the *qui tam* action.[13/] The Court of Appeals for the Fourth Circuit reversed, rejecting the position that a *qui tam* action is 'based upon' a public disclosure whenever the factual basis for the action has been disclosed into the public domain. The Court held that

> 'based upon' as meaning 'derived from' is the only fair construction of the statutory phrase ... . To 'base upon' means to 'use as a basis for.' (Citation omitted.) Rather plainly, therefore, a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based. Such an understanding of the term 'based upon,' apart from giving effect to the language chosen by Congress, is fully consistent with Section 3730(e)(4)'s indisputed objective of preventing 'parasitic' actions (citation omitted), for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

13/ *United States ex rel. Siller v. Becton Dickinson & Co.*, 813 F. Supp. 410, 412-13 (D. Md. 1993), *rev'd*, 21 F.3d 1339 (4th Cir. 1994).

21 F.3d at 1348.[14]

According to the *Siller* analysis, to be 'based upon' any public disclosures made in connection with the Dorris or Florida suits, Petitioner McKenzie must have "actually derived from th[ose] disclosure[s] the allegations upon which [her] qui tam action is based." *Id.* That is not the case, however. Mrs. McKenzie's allegations of fraud on the United States are based on her own experiences as an employee of BellSouth -- specifically, her supervisors' repeated orders that she participate in the company's fraudulent activities and her observation of those practices in the various offices in which she worked.

The Court of Appeals in this case rejected *Siller*'s reading of 'based upon,' adopting instead the opposing line of authority which construes 'based upon' to mean 'supported by' or 'similar to.' *United States ex rel. McKenzie*, 123 F.3d at 940-41, App. 10a-11a. Because the Court of Appeals found that the public disclosure relating to the Dorris and Florida suits provided support for Petitioner's claim, it held that Petitioner's suit is 'based upon' those disclosures. The Court found that its interpretation of 'based upon' had been adopted by the Courts

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[14] *Accord United States ex rel. LeBlanc v. Raytheon Co.*, 874 F. Supp. 35, 40-41 (D. Mass. 1995).

of Appeals for the Second,[15] Ninth,[16] Tenth,[17] and Eleventh[18] Circuits. *United States ex rel. McKenzie*, 123 F.3d at 940, App. 10a-11a.

The Court did not rule that Petitioner's *qui tam* claims were actually derived from public disclosures about the Dorris and Florida suits, but rather that her claims received a certain anecdotal or evidentiary support from those disclosures. The distinction between 'derived from' versus 'supported by' was essential to the Court's treatment of Petitioner's *qui tam* claims. Her case is therefore an ideal one to resolve the conflict between the federal appellate courts over the meaning of 'based upon' as used in 31 U.S.C. § 3730(e)(4)(A). Moreover, resolution of the conflict deserves the Court's attention. The standard adopted by the Court of Appeals in this case is inconsistent with the purposes of the *qui tam* provisions of the Act. These are to encourage private citizens to sue on the United States' behalf and discourage parasitic actions premised on nothing more than publicly-available sources. Barring actions by those who actually derive their allegations of wrongdoing from public information serves the Act's purposes;

15/ *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990).

16/ *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

17/ *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 957 (1993).

18/ *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994).

barring actions because some aspect of the fraud has received prior publicity does not.[19]

We submit that certiorari should be granted to resolve the conflict among the United States Courts of Appeals over the interpretation of 'based upon' as used in the Act.

II. Certiorari should be granted to resolve the conflict among the federal courts of appeals regarding the meaning of 'original source' as used in the False Claims Act, 31 U.S.C. § 3730(e)(4)(B).

The conflict among the Courts of Appeals with respect to the meaning of 'original source' is even more pronounced than their disagreements over the proper interpretation of 'based upon.' As the Court of Appeals noted in this case, there are three separate views of the meaning of 'original source.'[20] Some courts read the statute to mean precisely what it says -- an original source is someone who has direct and independent knowledge of the alleged violations of the Act and who has voluntarily provided that information to the Government before filing suit. 31 U.S.C. § 3730(e)(4)(A). According to these courts, nothing more is required to qualify as an 'original

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[19] Construing 'based upon' to bar a *qui tam* action because it makes allegations already in the public domain might be justified as a means of avoiding multiple *qui tam* actions arising out of a single violation of the Act. However, it is not necessary to stretch the meaning of 'based upon' to do so because the Act specifically prohibits such multiplicity, establishing a first-to-file rule that bars *qui tam* actions if another relator has filed the claim first. 31 U.S.C. § 3730(b)(5).

[20] *United States ex rel. McKenzie*, 123 F.3d at 941-43, App.12a-14a.

source.' The Third,[21] Fourth,[22] Seventh,[23] Tenth[24] and Eleventh[25] Circuits have so held.

Other courts add a further, atextual, element to the definition of 'original source.' However, these courts disagree as to both the source and substance of that element. According to the Second and Ninth Circuits, in order to qualify as an 'original source' the relator must not only meet the explicit requirements of section 3730(e)(4)(A), but must also show that it was a source to the person or entity that made the public disclosure of the allegations of fraud under the Act. *United States ex rel. Dick*, 912 F.2d 13 (2d Cir.); *Wang*, 975 F.2d 1412 (9th Cir.). On the other hand, in the District of Columbia Circuit and now, as a result of the Court of Appeals decision in this case, the Sixth Circuit, the relator must establish, beyond the direct and independent knowledge and voluntary disclosure requirement, that it made the disclosure of information to the Government before the information on which the *qui tam* claims are based was publicly disclosed. *United States ex rel. Findley v. FPC-Boror Employees Club*, 105 F.3d 675, 690-691 (D.C. Cir.), *cert. denied*, 66 U.S.L.W. 3259 (U.S. Oct. 6, 1997) (No. 97-157); *United States ex rel. McKenzie*, 123 F.3d 942-43, App. 15a. Both the District of Columbia Circuit and Sixth

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[21] *U.S. ex rel. Stinson*, 944 F.2d 1149.

[22] *Siller*, 21 F.3d 1339 (4th Cir. 1994).

[23] *Houck on behalf of the United States v. Folding Carton Administrative Committee*, 881 F.2d 494 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

[24] *United States ex rel. Precision Co.*, 971 F.2d 548 (10th Cir. 1992).

[25] *Cooper*, 19 F.3d 562.

Circuit reject the holdings in *United States ex rel. Dick* and *Wang* that the relator must have had some role in the public disclosure, in favor of their own extra-textual requirement.[26]

In this case the Court of Appeals did not find Petitioner's knowledge of fraud against federal facilities to be either indirect or dependent on other sources. Nor did the Court rule that Petitioner failed to make the required voluntary disclosure of her information to the Government before her suit was filed. Rather, it held that Petitioner could not be an original source solely because public disclosures relating to the Dorris and Florida suits pre-dated her disclosures to the Government. The question whether the original source provision should be construed according to its terms or whether there are added requirements not found in its text is raised squarely in this case.

The disharmony over the meaning of 'original source' is worthy of this Court's attention. Whether one who elects to pursue *qui tam* claims may do so as an original source should not depend on where the suit was filed. The conflict among the Courts of Appeals over literal or atextual readings of the term is only exacerbated by the further layer of disagreement over the source and substance of the judicially-created requirements that four Courts of Appeals have imposed.

The holding that an original source's voluntary disclosure to the United States must precede a public disclosure of some or all of the same information is driven by a view that once the United States is on notice of possible violations of the Act (actually or constructively, due to a public disclosure of

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[26] *United States ex rel. Findley*, 105 F.3d at 689; *United States ex rel. McKenzie*, 123 F.3d at 942, App. 15a-16a.

fraud made prior to the relator's voluntary disclosure), any assistance by the relator in advancing claims on the United States' behalf is unnecessary.[22] That view is incorrect. An 'original source' is an eyewitness to fraud against the United States (*i.e.* someone with direct and independent knowlegdge of the information on which the alleged violations of the Act are based, 31 U.S.C. § 3730(e)(4)(B)). The active participation of an eyewitness willing to shoulder the burden of pursuing fraud claims on the United States' behalf is clearly valuable.

Moreover, the focus on the fact that the United States is on notice that fraud has or may have been committed against it misses entirely the point of the 1986 amendments to the Act. As the legislative history of these amendments makes clear, the United States cannot and does not pursue all potential fraud claims. The Senate concluded that "perhaps the most serious problem plaguing effective enforcement [of the Act] is a lack of resources on the part of Federal enforcement agencies ... [These amendments,] which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government fraud enforcement effort." S. Rep. at 8. Similarly, the House of Representatives found "that there are instances in which the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action." H.R. Rep. No. 660, 99th Cong., 2d Sess. at 22-3 (1986). The fact that the United States might bring claims under the Act because it is on notice of improper transactions or allegations of fraud is no justification for precluding a *qui tam* action. "[I]ndeed, it was *precisely such a regime* that Congress sought to abandon in enacting the 1986 amendments." *United States ex rel. Prawter & Co. v. Fleet*

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[22] *United States ex rel. McKenzie*, 123 F.3d at 942-43, App. 16a; *United States ex rel. Findley*, 105 F.3d at 690-91.

Bank, 24 F.3d 320, 329 (1st Cir. 1994) (emphasis in original) (rejecting the view that a *qui tam* action is barred because the United States had notice of its basis. The Court referred to 31 U.S.C. § 3730(b)(4)(1982), which was superseded by the 1986 amendments to the Act. That provision precluded all *qui tam* actions "based on evidence or information the Government had when the action was brought.").

We submit that certiorari should be granted to settle the dispute among the United States Courts of Appeals over the interpretation of 'original source' as used in the Act.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., MARY C. MCKENZIE; MARY C. MCKENZIE,
Plaintiffs-Appellants,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., doing business as South Central Bell Telephone Company,
Defendant-Appellee.

No. 96-5268

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 94-00730--James H. Jarvis II, Chief District Judge.

Argued: February 7, 1997

Decided and Filed: August 26, 1997

Before: NORRIS and MOORE, Circuit Judges; RUSSELL, District Judge.*

COUNSEL

ARGUED: William C. Buckhold, FORT & SCHLEFER, Washington, D.C. for Appellant. Matthew H. Patton, KILPATRICK & CODY, Atlanta, Georgia, for Appellee. **ON BRIEF:** William C. Buckhold, Leonard Egan, FORT & SCHLEFER, Washington, D.C., Ronald J. Zuker, VAUGHAN & ZUKER, Knoxville, Tennessee, for Appellant. Matthew H. Patton, KILPATRICK & CODY, Atlanta, Georgia, for Appellee.

RUSSELL, D. J., delivered the opinion of the court, in which MOORE, J., joined. NORRIS, J. (p. 21), delivered a separate dissenting opinion.

OPINION

RUSSELL, District Judge. The plaintiff, Mary McKenzie, brought this qui tam action[1] under the False Claims Act ("FCA"), 31 U.S.C. § 3729-3733, for BellSouth Telecommunications, Inc.'s ("BellSouth") allegedly fraudulent activities against the United States government. McKenzie

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*The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

[1]A qui tam action is one "brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act . . ., part of the penalty to go to any person who brings such action and the remainder to the state or some other institution." BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

also asserted a claim on her own behalf under the FCA's whistleblower protection provision. The district court dismissed McKenzie's complaint for lack of subject matter jurisdiction under the FCA, which prohibits qui tam actions "based upon" public disclosures of fraud unless the relator is an "original source" of the information. We affirm in part and reverse in part.

I.

McKenzie was an employee of BellSouth's subsidiary, South Central Bell, from December 1966 until March 1992 when she left work on permanent disability status. For most of her career at South Central Bell McKenzie was a dispatcher for the company's maintenance technicians. This position included receiving and processing complaints about telephone service, dispatching repair personnel, and closing these "trouble reports" once repairs were completed.

South Central Bell provides telephone service throughout Tennessee, Kentucky, Alabama, Mississippi, and Louisiana and its customers include the Tennessee Valley Authority and a Department of Energy facility at Oak Ridge, Tennessee, both federal facilities. When a telephone line is out of service for more than 24 hours, South Central Bell must refund the cost of that day's service for those customers who request a refund, except in the following circumstances: service is diminished but the line is not completely out of service; repairs are impossible because the customer's premises are inaccessible; the condition is reported by an employee and not the customer; and the customer extends the period of time for repairs to be completed.

According to McKenzie's complaint, South Central Bell, to avoid having to make refunds to the United States and other customers, falsified trouble reports so that it would appear that lines were repaired within 24 hours or that one of the exceptions applied. McKenzie says that she and other dispatchers routinely misclassified telephone lines as either in service or diminished service when the lines were actually out

of service, reported that service had been restored within 24 hours when it had not been, reported that premises were inaccessible when they were not, and misclassified trouble reports as having been initiated by a South Central Bell employee when they were actually initiated by the customer.

McKenzie began complaining to her supervisors at South Central Bell about these practices in 1984 and continued to complain until she left her position on disability status. On one occasion McKenzie showed her supervisor a newspaper article describing a similar fraud being perpetrated in Florida. McKenzie claims that as a result of her complaints she was harassed and threatened with discharge. After suffering two emotional breakdowns a company psychiatrist placed McKenzie on permanent disability leave.

McKenzie filed suit under the FCA, which allows individuals with information regarding the commission of fraud against the United States to bring suit on the government's behalf.[2] McKenzie also brought a retaliation claim on her own behalf under 31 U.S.C. § 3730(h).

II.

We review the district court's dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction de novo. *Duncan v. Rohm Mil-Spec Computers*, 917 F.2d 261, 263 (6th Cir. 1990). A motion to dismiss is properly granted only if it appears that the plaintiff can prove no set of facts which would entitle her to relief. All factual allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Ang v. Proctor & Gamble Co.*, 932 F.2d 540, 544 (6th Cir. 1991). Federal courts are courts of

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[2]The statute requires persons bringing a suit under its provisions ("relators") to submit the allegations under seal to the United States Attorney's office. The United States Attorney reviews the allegations and determines whether it would be in the government's interest to intervene in the suit. McKenzie complied with this requirement and the United States elected not to intervene.

limited jurisdiction. *Aldinger v. Howard*, 427 U.S. 1, 15, 96 S. Ct. 2413, 2421, 49 L. Ed.2d 276 (1996). Therefore, the plaintiff bears the burden of establishing jurisdiction. *Theurissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991).

III.

The qui tam provision of the False Claims Act allows private citizens, acting on behalf of the government, to recover treble damages from anyone who has committed a fraud upon the government.[3] Any individual bringing such an action can receive up to 30% of the money recovered. 31 U.S.C. § 3730(d)(2). Congress has placed some jurisdictional limits on qui tam actions, however, in the interest of avoiding parasitic suits. *See United States* ex rel. *Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.), *cert. denied*, 115 S. Ct. 316, 130 L. Ed.2d 278 (1994). Specifically, the Act provides: "No court shall have jurisdiction over an action under this section *based upon* the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, . . . or from the news media, unless the action is brought by the Attorney General or the person bringing the action is the *original source* of the information." 31 U.S.C. § 3730(e)(4)(A) (emphasis added).

The original version of the FCA, enacted in 1863, allowed anyone to bring a qui tam action and receive 50 percent of the amount recovered. S. REP. NO. 345, 99th Cong., 2d Sess. 8-10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. This broad provision led to abuse and in 1943, following the Supreme Court's decision in *United States* ex rel. *Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943),

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[3] McKenzie alleges that BellSouth violated sections of the Act that prohibit "knowingly present[ing], or caus[ing] to be presented [to the United States government] a false or fraudulent claim for payment or approval," and "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1), (7).

which held that a relator could bring a qui tam action even though the action was based entirely upon information contained in a government indictment, Congress amended the FCA. The 1943 version precluded actions "based on evidence or information the government had when the action was brought." *United States* ex rel. *Stinson v. Prudential Insurance Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991) (quoting 31 U.S.C. § 3730(b)(4) (1982) (superseded)). This led to claims being barred even in cases where the qui tam plaintiff supplied the information to the government before filing the claim. *See United States* ex rel. *Wisconsin v. Dean*, 729 F.2d 1100, 1106 (7th Cir. 1984).

In 1986, Congress amended the FCA again "to encourage any individual knowing of Government fraud to bring that information forward." S. REP. NO. 345, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266. "To revitalize the qui tam provisions, the amendment provided incentives for private enforcement, including increased monetary awards, adopted a lower burden of proof, and allowed the qui tam plaintiff to remain a party to the action even if the Government intervenes." *Stinson*, 944 F.2d at 1154. Our focus is on whether the 1986 amendments extend jurisdiction to include McKenzie's suit.

IV.

1. "Based Upon" a Public Disclosure

The first issue to be addressed is whether there has been a "public disclosure" because if there has not, there is no jurisdictional bar. *United States* ex rel. *Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996); *United States* ex rel. *Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); *Cooper v. Blue Cross and Blue Shield*, 19 F.3d 562, 565 n.4 (11th Cir. 1994). Although the FCA was designed to encourage corporate whistleblowers, a "relator must be a true whistleblower." *United States* ex rel. *Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994). She is unable to pursue the suit and

collect a percentage of the recovery if the case is based upon information that has previously been made public or if the claim has already been filed by another. *Id.*

A public disclosure occurs when information has been disseminated through "a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media." 31 U.S.C. § 3730(e)(4)(A). "Public disclosure" also includes documents that have been filed with a court, such as discovery documents and a plaintiff's complaint. *Quinn*, 14 F.3d at 652; *Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995) ("[A]ny information disclosed through civil litigation and on file with the clerks office should be considered a public disclosure of allegations in a civil hearing for the purposes of section 3730(e)(4)(A)." (quoting *United States* ex rel. *Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir.), *cert. denied*, 115 S. Ct. 316, 130 L. Ed.2d 278 (1994))).

The district court concluded that McKenzie's allegations were "based upon" information publicly disclosed through two lawsuits against companies owned by BellSouth. The first lawsuit, the *Dorris* case, was filed by Ronald Dorris against South Central Bell in a Tennessee state court, asserting wrongful discharge and tort claims. One of Dorris's allegations was that South Central Bell employees were incorrectly reporting the time at which a repair was made if the repair was not made within the time promised. Although not directly addressing fraud against federal facilities, Dorris's allegations are nearly identical to some of McKenzie's claims,[4]

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[4]Dorris's complaint alleges fraudulent conduct similar to that alleged by McKenzie. For example, the complaint states:

> 11. In 1990, Defendant South Central Bell, by and through it employees, . . . informed Plaintiff and other South Central Bell repair employees that they were to falsify cable records on repair orders, in order for the Jackson District of South Central Bell to

and the suit was widely disseminated by Tennessee newspapers.[5]

The second lawsuit, *Falsetti*, was a qui tam action filed against another division of BellSouth, Southern Bell. *Falsetti* contained allegations similar to those in McKenzie's complaint, regarding federal customers in Southern Bell's region, Florida, Georgia, North Carolina, and South Carolina. In fact, large portions of McKenzie's complaint are nearly identical to portions of the *Falsetti* complaint, and McKenzie acknowledges that she showed her supervisor a newspaper article concerning the *Falsetti* case.

> adhere to the qualifications of the Tennessee Public Service Commission.
>
> 12. Plaintiff was "written-up" by Defendant Matthews and subsequently had an entry placed in his personnel file by Defendant Matthews because plaintiff failed to falsify repair orders on a customer's outside phone line.
>
> 13. Plaintiff complained about the falsification of said cable codes to the Public Service Commission[.] Plaintiff drew further attention to the falsification of codes, fraud, the misuse of company funds, the misuse of public funds, and fraud towards the Public Service Commission in said fraudulent practices.

Joint Appendix 110.

[5] An article by *The Commercial Appeal*, a Memphis newspaper, described Dorris's allegations:

> [E]mployees said they were told to backdate reports, so that if a customer's telephone service repair was promised by 5 p.m. and the technician didn't complete the repair until 6 p.m., he would enter 4:55 p.m. on the report.

Richard Locker, *False Service Reports Found at Bell, Ex-Worker Says*, COMMERCIAL APPEAL (MEMPHIS), Apr. 3, 1994, at Joint Appendix 135. The *Chattanooga Times* ran a similar story on April 4, 1994. *See Ex-Bell Worker Says Report Falsified*, CHATTANOOGA TIMES, Apr. 4, 1994, at B1; Joint Appendix 137.

McKenzie contends that because her allegations involve only South Central Bell's practices in Tennessee the *Falsetti* allegations do not constitute public disclosure, even though both claims are ultimately against BellSouth. The Tenth Circuit considered a similar claim in *United States* ex rel. *Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995). In *Sandia*, the relator brought an action against Sandia Corporation, which is one of several laboratories owned by the Department of Energy. The court concluded that the district court lacked subject matter jurisdiction because previous disclosures had "sufficiently alerted the government to the likelihood that Sandia" would be engaged in fraudulent behavior. *Id.* at 571. The plaintiff contended that even though there had already been a public disclosure of the fraudulent practices, the disclosure concerned only "the national laboratories' practices" and the practices of two of the laboratories while his complaint specifically addressed Sandia. The court rejected this argument and concluded: "Because the [Government Accounting Office] report and the congressional hearing set the government on the trail of the alleged fraud without Mr. Fine's assistance, we believe it would be contrary to the purposes of the FCA to exercise jurisdiction over his claim." *Id.*

It is clear that McKenzie's allegations were publicly disclosed prior to the filing of her suit through the *Falsetti* and *Dorris* cases and the publicity related to them. Therefore, we must next consider whether McKenzie's qui tam action is "based upon" these prior disclosures. *Cooper v. Blue Cross and Blue Shield*, 19 F.3d 562, 565 n.4 (11th Cir. 1994). McKenzie urges us to adopt the standard for "based upon" articulated by the Fourth Circuit in *United States* ex rel. *Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 115 S. Ct. 316, 130 L. Ed.2d 278 (1994). *Siller* concluded that "based upon" means "derived from" and, therefore, "a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based." *Id.* at 1348. Under this interpretation

two identical suits could proceed so long as each relator did not derive his or her claim from the other.

The Tenth Circuit adopted a different interpretation of "based upon" in *United States* ex rel. *Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 507 U.S. 951, 113 S. Ct. 1364, 122 L. Ed.2d 742 (1993). In *Precision*, the court interpreted "based upon" to mean "supported by," which includes any action based even partly upon public disclosures. The court concluded: "Congress chose not to insert the adverb 'solely', and we cannot, because to do so would dramatically alter the statute's plain meaning." *Id.* at 552. The court continued: "Not only are we governed by the plain language of the statute, we must also be mindful that 'statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.' " *Id.* (quoting *F & S Constr. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964)). Three other circuits have adopted similar approaches. *See Cooper v. Blue Cross and Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994) (holding "based upon" to mean "supported by" and "qui tam suits to be based upon public disclosures even if the relator had independent evidence of wrongdoing); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992) (holding a qui tam suit based upon public disclosures even though it contained some new allegations because "the allegation repeats what the public already knows"); *United States* ex rel. *Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990) ("[I]f the information on which a qui tam suit is based is in the public domain, and the qui tam plaintiff was not a source of that information, then the suit is barred."). The Tenth Circuit later clarified its interpretation by explaining that a court "must determine whether 'substantial identity' exists between the publicly disclosed allegations or transactions and the qui tam complaint." *U.S.* ex rel. *Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996).

We conclude that the interpretation of "based upon" endorsed by the Tenth Circuit is the most consistent with the FCA's purpose. The jurisdictional requirements are designed

to restrict the number of persons who can bring qui tam actions and thereby avoid parasitic suits. In construing "based upon" to mean "supported by" we effectively preclude individuals who base any part of their allegations on publicly disclosed information from bringing a qui tam action. *Precision*, 971 F.2d at 552. McKenzie's claims are clearly "based upon" public disclosures. They are not merely similar to the allegations in *Dorris* and *Falsetti*; portions of McKenzie's complaint are virtually identical to the complaint in *Falsetti*, and McKenzie admits, in her complaint, awareness of the *Falsetti* allegations. In addition, her allegations are the same as some of the allegations made by Dorris and reported in the Tennessee newspapers. Therefore, it is not difficult to conclude that McKenzie's lawsuit is based, at least in part, upon the allegations brought in *Dorris* and *Falsetti*.

2. "Original Source"

Because we have determined that McKenzie's allegations were based upon public disclosures, she must have been an "original source" for the district court to have jurisdiction over her action. 31 U.S.C. §3730(e)(4)(A); *Precision*, 971 F.2d at 553. An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

In construing the term "original source," other courts have "impose[d] a conjunctive requirement - direct and independent - on qui tam plaintiffs." *United States* ex rel. *Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994); *United States* ex rel. *Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991); *United States* ex rel. *Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027, 110 S. Ct. 1471, 108 L. Ed.2d 609 (1990). The word "direct is usually interpreted as "marked by absence of intervening agency," *Stinson*, 944

F.2d at 1160, while "independent knowledge" is not "dependant on public disclosure." *Houck*, 881 F.2d at 505.

The meaning of "original source" is a matter of first impression for this Circuit, and the other circuits have taken different approaches to determining whether a relator is an original source. The Second Circuit, for example, has concluded that "a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." *United States* ex rel. *Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990). In *Dick*, the public disclosure was a prior lawsuit with the same allegations. The court determined that because the relators were not the source of the allegations in the first lawsuit, they did not qualify as original sources.

The Ninth Circuit adopted a similar construction in *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). In *Wang*, the court concluded that the relator had direct and independent knowledge of the alleged fraud, but because someone else publicly disclosed the alleged fraud first, the relator was barred from bringing suit. *Id.* at 1417-18. "To bring a qui tam suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit." *Id.* at 1418. Under this interpretation, one who discloses an allegation directly or indirectly by reporting it to the government or the media is an original source. *Id.* at 1419. The court reasoned:

> If, however, someone republishes an allegation that already has been publicly disclosed, he cannot bring a qui tam suit even if he has direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence" and not their mimics.

Id. (citing S. REP. NO. 345, 99th Cong., 2d Sess. at 6, *reprinted in* 1986 U.S.C.C.A.N. 5271).

The Eleventh Circuit, on the other hand, has taken a different approach and concluded that the FCA only requires direct and independent knowledge. The court came to this conclusion because the Second and Ninth Circuits' requirement "does not appear in the plain language of the statute, and we find no support for it in the legislative history." *Cooper*, 19 F.3d at 568 n.13. In *Cooper*, the relator had independently researched the alleged fraud and had reported it to members of Congress. His knowledge "was obtained independently of the allegations disclosed at the [Congressional] hearing." *Id.* at 568. The court, relying on legislative history, concluded that " 'a party with knowledge of fraud against government should be able to maintain a qui tam action so long as he had some of the information in advance of the public disclosure.' " *Id.* (quoting Senator Grassley). The Third, Fourth and Tenth Circuits have adopted similar approaches. *See United States* ex rel. *Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996) ("[D]irect knowledge is knowledge gained by the relator's own efforts and not acquired from the labors of others. . . . [T]o be independent the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original sources."); *United States* ex rel. *Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir. 1994) ("[A] qui tam plaintiff need not be a source to the entity that publicly disclosed the allegations on which the qui tam action is based in order to be an original source . . . . [He need only have] direct and independent knowledge of the information on which the allegations in the public disclosure [are] based."); *United States* ex rel. *Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1990) ("[A] relator who would not have learned of the information absent public disclosure did not have 'independent' information within the statutory definition of 'original source.' " (citing *United States* ex rel. *Houck v. Folding Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027, 110 S. Ct. 1471, 108 L. Ed.2d 609 (1990))).

The D.C. Circuit recently articulated a third approach to determining whether a relator is an "original source" in *United*

States ex rel. *Findley v. FPC-Boron Employees Club*, 105 F.3d 675 (D.C. Cir. 1997). In *Findley*, the court adopted an analysis similar to that employed by the Second and Ninth Circuits but with one crucial difference - the relator must have informed the government of the allegations before they become public disclosures. In addition, to be an original source, one must "have direct and independent knowledge of the information on which the publicly disclosed allegations are based." *Id.* at 690. The court defined "direct" to mean first-hand knowledge and "independent" to mean that the information known by the relator does not depend or rely upon the public disclosures. *Id.*

In declining to adopt the Second and Ninth Circuits' approach, the court explained that "the statute only contemplates an 'original source' being a 'source' to the government" and not to the world at large. *Id.* at 690. The court noted that the statute itself does not impose the requirement that the "original source" provide information to the entity that made the public disclosures, merely requiring that the relator "voluntarily provide[ ] the information to the government." *Id.*; 31 U.S.C. § 3730(e)(4)(B).

Although this Court has not yet addressed the issue of when one is an "original source," it had an opportunity to consider the FCA in *United States* ex rel. *Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994). In *Taxpayers*, this Court discussed the requirements for being a "whistleblower":

> [T]he relator must be a true 'whistleblower'; therefore, he is precluded from collecting a bounty if the case is brought on the basis of information that has already been publicly disclosed, or if someone else has filed the claim first.

Id. at 1035. We find it difficult to understand how one can be a "true whistleblower" unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain. Therefore, we adopt the approach of the

District of Columbia Circuit and conclude that, to be an original source, a relator must inform the government of the alleged fraud before the information has been publicly disclosed.

We reach this conclusion based on Congress's purpose in amending the Act and the plain meaning of the Act. Before the 1986 amendments, jurisdiction under the FCA had experienced two extremes: The original statute which allowed suits to proceed even though they had been copied from federal indictments, and the 1943 amendments to the Act, which precluded all suits in which the government already had knowledge of the fraud even if that knowledge came from the relator. *See United States* ex rel. *Marcus v. Hess*, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943); *United States* ex rel. *Wisconsin v. Dean*, 729 F.2d 1100, 1106 (7th Cir. 1984).

"The purpose of the qui tam provisions of the FCA is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward." H.R. REP. NO. 660, 99th Cong., 2d Sess. 22 (1986). The interpretation of "original source" adopted by this Court today is consistent with this goal and "is most likely to bring 'wrongdoing to light' since, by barring those who come forward only after public disclosure of possible False Claims Act violations from acting as qui tam plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time." *Dick*, 912 F.2d at 18.

At the same time, this approach furthers Congress's second goal in amending the FCA: "[T]o prevent 'parasitic' qui tam actions in which relators, rather than bringing to light independently discovered information of fraud, simply feed off of previous disclosures of government fraud." *Siller*, 21 F.3d at 1347. Anyone who alerts the government and is a "true whistleblower" deserves any reward that may be obtained by pursuing a qui tam action under the FCA. However, the individual who sits on the sidelines while others disclose the allegations that form the basis of her complaint should not be

able to participate in any award. This would be contrary to the purpose of the statute.

In adopting the D.C. Circuit's approach over that of the Second and Ninth Circuits we conclude that, although both approaches require that the relator be the first to "blow the whistle," the D.C. Circuit's requirements do more to promote the FCA's mission - to alert the government that a fraud is being perpetrated against it. The statute's requirement that a relator file his or her action under seal for the U.S. Attorney's Office to review before proceeding with the action supports this interpretation. The government has the clearest interest in the information and the FCA was designed to give whistleblowers the incentive to provide the government with such information. Further, this interpretation protects the "true whistleblower," the person who reports fraud to the government before it is publicly disclosed, by allowing her to maintain a qui tam action. As the court explained in *Findley*, "[a] person who provided information to the government that subsequently was uncovered by a reporter and printed in the newspaper would still be able to maintain a qui tam action." *Findley*, 105 F.3d at 690.

To qualify as an original source, the relator must have direct and independent knowledge of the information on which the publicly disclosed allegations are based. In addition, the relator must provide the government with the information prior to any public disclosure. There is no additional requirement that the relator be responsible for providing the information to the entity that publicly disclosed the allegation of fraud as long as the relator provides the information to the government prior to any public disclosure.

Based on this interpretation, it is clear that McKenzie is not an "original source." Her complaint was filed three years after *Falsetti* and well after the allegations in *Dorris* were made public. She was not the first to inform the government of the alleged fraud being perpetrated by BellSouth through a subsidiary, nor was she the first to report alleged fraud on the

part of South Central Bell. McKenzie is not a "true whistleblower" and cannot benefit as if she were one.

V.

Even though we have determined that McKenzie cannot bring a qui tam action under the FCA, we must still consider her claim for retaliation. The FCA, to further encourage whistleblowers, provides protection for those who pursue or contribute to qui tam actions. Specifically, § 3730(h) states:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others *in furtherance of an action under this section*, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. § 3730(h) (emphasis added). The legislative history indicates that Congress understood "that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation." S. REP. NO. 345, 99th Cong., 2d Sess. 35 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5300.

For a retaliation claim to be successful, the plaintiff must show that she was engaged in a protected activity and that her employer knew about it. *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994) (citing S. REP. NO. 345, 99th Cong., 2d Sess. 35 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5300), *cert. denied*, 115 S. Ct. 1110, 130 L. Ed.2d 1075 (1995). The statute provides examples of the types of activity that are protected, including investigation, initiation of a suit, and testimony, but these examples are not exclusive and the legislative history indicates that "[p]rotected activity should . . . be interpreted broadly." S. REP. NO. 345,

99th Cong., 2d Sess. 35 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5300. We conclude that the activity engaged in by McKenzie, including bringing the alleged fraud to the attention of her supervisors and showing them a newspaper article describing a qui tam action in Florida involving similar allegations of fraud, are protected activities within the meaning of the Act.

Section 3730(h) "provides relief only if the whistleblower can show by a preponderance of the evidence that the employer's retaliatory actions resulted 'because' of the whistleblower's participation in a protected activity." *Id.* Several courts have concluded that § 3730(h) allows internal or intracorporate whistleblowers to recover for retaliation. *See Robertson*, 32 F.3d at 951 (noting district court cases that have concluded that § 3730(h) protects internal whistleblowers). However, these courts have given the internal whistleblower a heavier burden to carry when seeking relief under § 3730(h). For example, the Fifth Circuit, in *Robertson v. Bell Helicopter Textron*, concluded that the plaintiff's complaints to his employer about allegedly fraudulent activity did not constitute a protected activity because "he never used the terms 'illegal,' 'unlawful,' or 'qui tam action.' " *Id.* In addition, the *Robertson* court concluded that the plaintiff's investigative activities were within the scope of his employment and his employer had no reason to know that such investigations extended beyond the requirements of his position in furtherance of a qui tam action. *Id. See also United States* ex rel. *Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1522 (10th Cir. 1996) (concluding that plaintiff's retaliation claim was properly dismissed because her activities were part of her employment duties and she had not otherwise indicated an intent to pursue a qui tam action or to report alleged fraud to government officials).

McKenzie advocates the interpretation of § 3730(h) adopted by the district court in *Mikes v. Strauss*, 889 F.Supp. 746 (S.D.N.Y. 1995), another case involving an internal whistleblower. In *Mikes*, the court concluded that the plaintiff's activities, observing inappropriate use of tests,

investigating the use of tests, and reporting her conclusions to her employers, constituted protected activities. *Id.* at 752. The court, in considering whether the employer had sufficient knowledge of the plaintiff's activities, interpreted *Robertson* as requiring the following: "[A]n employee must supply sufficient facts from which a reasonable jury could conclude that the employee was discharged because of activities which gave the employer reason to believe that the employee was contemplating a qui tam action against it." *Id.* at 753. Based on this interpretation, McKenzie has sufficiently stated activities that would have given South Central Bell reason to believe that she was contemplating a qui tam action. We believe the *Mikes* interpretation of *Robertson* to be correct.

Even if we were to adopt a more limited interpretation of *Robertson*, McKenzie's allegations are distinguishable in two respects. First, McKenzie alleges that she showed her supervisors a "newspaper article about a similar fraud being perpetrated by the telephone company in Florida," a reference to the *Falsetti* litigation, which, as noted above, closely parallels McKenzie's qui tam action. Since *Falsetti* involved a fraud perpetrated against the federal government by another subsidiary of BellSouth, McKenzie's putting BellSouth on notice that she was aware of the *Falsetti* allegations would constitute facts considered significant by the *Robertson* court. Second, McKenzie's activities were not within the scope of her employment and, coupled with her presentation of the newspaper article, served to put South Central Bell on notice of the possibility of a qui tam action. Therefore, McKenzie's retaliation claim should not have been dismissed.

VI.

Because McKenzie's claim is based upon publicly disclosed information and because she is not an "original source" as that term is defined above, the district court was correct in determining that it did not have subject matter jurisdiction over her qui tam action. However, the district court improperly dismissed McKenzie's claim for retaliation because she has adequately alleged that her employer was aware that

she was contemplating pursuing a qui tam action under the FCA. Discovery shall reveal whether these allegations can be supported. Therefore, we AFFIRM the dismissal of the qui tam action, but we REVERSE the district court's order dismissing McKenzie's retaliation claim, and REMAND for further proceedings consistent with this decision.

DISSENT

ALAN E. NORRIS, dissenting. Because I would affirm the district court, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 96-5268

Filed
Aug. 26, 1997
Leonard Green, Clerk

UNITED STATES OF AMERICA, ex rel.,
MARY C. McKENZIE;
MARY C. McKENZIE,

Plaintiffs - Appellants,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
doing business as
South Central Bell Telephone Company,

Defendant - Appellee.

Before: Norris and Moore, Circuit Judges;
Russell, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing the *qui tam* action of plaintiff Mary C. McKenzie is AFFIRMED; the district court's order dismissing plaintiff McKenzie's retaliation claim is REVERSED. IT IS FURTHER ORDERED that the case is REMANDED for further proceedings consistent with the opinion.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Leonard Green, Clerk

Issued as Mandate: 10/20/97

COSTS: No Costs

Filing Fee . . . . . .$
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A True Copy

Attest:

s/Diane Schnur
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA, ex rel., MARY C. McKENZIE, and MARY C. McKENZIE,	)	
Plaintiffs	)	
v.	)	No. 3:94-cv-730
BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY,	)	
Defendant	)	

MEMORANDUM OPINION

Plaintiff, Mary C. McKenzie, is a 26-year former employee of defendant BellSouth Telecommunication, Inc., d/b/a South Central Telephone Company ("BellSouth"). Plaintiff asserts two sets of claims against BellSouth under the False Claims Act (the "Act"), 31 U.S.C. §§ 3729, *et seq.* Plaintiff brings her first set of claims (Counts I-III) as a *qui tam*[1] action. Plaintiff's (or "relator's") suit is on behalf of

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[1]Lit. "who as well." A qui tam action is "brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution ... plaintiff states that he sues as *well* for the state as for himself." *Black's Law Dictionary*, 1126 (5th Special Deluxe ed. 1979).

the United States government and arises out of BellSouth's alleged fraudulent practices regarding record-keeping, billing, and refunds for out-of-service telephone lines. Plaintiff also asserts a retaliatory discharge claim for herself (Count IV) pursuant to the "whistleblower" protection provision of the Act, 31 U.S.C. § 3730(h) (Supp. 1995).[2] This claim, which is not limited to *qui tam* plaintiffs, arises out of BellSouth's alleged harassment of plaintiff following both her refusal to participate in its fraudulent practices and her complaints about the scheme to her superiors.

This matter is presently before the court on two motions filed by BellSouth [*see* Docs. 11 and 13].[3] In its first

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[2]This provision provides as follows:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730(h) (Supp. 1995).

[3]These motions were heard by the court on November 21, 1995.

motion, BellSouth contends that this court lacks subject matter jurisdiction because: (1) the allegations relating to record falsification by BellSouth have already been publicly disclosed; (2) plaintiff is not an "original source" within the definition of the Act; and (3) plaintiff's retaliation claim is pre-empted by the National Labor Relations Act ("NLRA") and must therefore be decided in arbitration, pursuant to the collective bargaining agreement executed between BellSouth and the Communication Workers of America [*see* Doc. 11]. In its other motion, BellSouth moves to dismiss for failure to state a claim upon which relief may be granted because all four counts of the complaint are premised upon BellSouth allegedly failing to provide telephone service of the quality and level required by tariffs, regulations, and contracts; however, according to BellSouth, the complaint fails to identify any particular tariff, regulation, or contract which has been violated by BellSouth in relation to the quality and level of service [*see* Doc. 13]. Furthermore, BellSouth says that the complaint fails to allege, and plaintiff cannot prove, that any representative of the United States government has ever requested a refund from BellSouth which has refused to pay [*see id.*].

For the reasons that follow, BellSouth's first motion will be granted, its second motion will be denied as moot, and this case will be dismissed.

I.

Background Information

It is undisputed that Ms. McKenzie was employed with BellSouth from December 1966 until March 1992. She contends that, as a dispatcher in the installation and maintenance area, she dispatched out repair service technicians. According to Ms. McKenzie, BellSouth, between 1977 and 1992:

> conspired with and through its employees and agents to defraud its subscribers including the Government, by falsely representing to the Commissions and to SCB's [BellSouth's] subscribers that SCB [BellSouth] met the quality and level of telephone service required by the tariffs, regulations, and Contracts, that customers were properly being billed for services actually provided, and that refunds were being made when due.

[*See* Doc. 1, ¶ 18]. Also, according to Ms. McKenzie, telephone repair records were knowingly and systematically altered by BellSouth's managers and employees in the following manner:

> 1. Misclassifying telephone lines as "In Service" or "Affecting Service" when the lines were actually "Out of Service." This type of falsification was used to avoid paying refunds of SCB's [BellSouth's] subscribers when they were in fact due;
>
> 2. Reporting the service was restored to "Out of Service" lines within the specified period (24 hours or less), when in fact service was not restored within the required period. This type of falsification was used to avoid paying refunds to SCB's [BellSouth's] subscribers when they were in fact due;
>
> 3. Reporting that telephone repair technicians were denied access to the subscriber's premises to restore service when in fact no repair technician was dispatched to the premises in time to meet the 24-hour

> service restoration requirement. This type of falsification was used to avoid paying refunds to SCB's [BellSouth's] subscribers when they were in fact due;
>
> 4. Misclassifying reports of trouble on telephone lines as having initially been reported by SCB [BellSouth] employees, when in fact the initial reports were made by a subscriber ... . This type of falsification was used to avoid paying refunds to SCB's [BellSouth's] subscribers when they were in fact due; and
>
> 5. Misclassifying telephone lines as "Out of Service" and repaired within the specified period (24 hours or less), when in fact they should have been classified as "Affecting Service." This type of misclassification was used to improve the indices, and thus misrepresent to the Commissions and to SCB's [BellSouth's] subscribers the level of service being provided, by representing that more repairs were made within the required period (25 hours or less) than were in fact required.

[*See* Doc. 1, ¶23]. In addition to the general allegations of fraud involving BellSouth customers in Tennessee, Ms. McKenzie alleges fraud upon the United States government based upon information and belief. These information and belief allegations specifically mention fraudulent activities at various Tennessee Valley Authority facilities and at the Department of Energy facility at Oak Ridge, Tennessee.

Count I of plaintiff's *qui tam* lawsuit alleges that BellSouth failed to make a required refund to the United States

government. Count II of plaintiff's *qui tam* lawsuit alleges that BellSouth falsely represented the quality and level of its service, but does not differentiate the government from the many other subscribers of BellSouth. Count III of the plaintiff's *qui tam* lawsuit alleges that BellSouth knowingly presented bills to officers or employees of the government and/or members of the armed forces for payment or approval, knowing that the monthly bills were based in part on records and reports that included false and/or inaccurate information relating to the quality and level of service being provided and subscriber refunds owed and being made.

Lastly, in Count IV of the complaint, plaintiff alleges retaliatory discharge by BellSouth. More specifically, plaintiff claims that her supervisor, Barbara Brown, ordered her to falsify records by changing commitment times for repairs to be performed. When Ms. Brown subsequently gave plaintiff an unsatisfactory rating, Ms. McKenzie filed a grievance with the union that represents the employees of the Knoxville Installation and Maintenance Center (IMC), contending that the evaluation rating was unjustified. The unsatisfactory rating was apparently withdrawn. Shortly thereafter, on January 20, 1992, plaintiff refused to falsify a trouble report for a repair technician, who then reported the matter to Ms. McKenzie's supervisor, Ms. Crum. According to the complaint, "Ms. McKenzie told Ms. Crum that falsifying the records was a serious matter. Ms. McKenzie also showed Ms. Crum a copy of a newspaper article about a similar fraud being perpetrated by the telephone company in Florida." [*See* Doc. 1, ¶ 82]. As a result of this confrontation with Ms. Crum, Ms. McKenzie alleges that she suffered an emotional breakdown. When Ms. McKenzie returned to work, another confrontation between plaintiff and Ms. Crum occurred, after which a second emotional breakdown occurred, according to the complaint. After several visits to a psychiatrist, plaintiff alleges that "SCB placed Ms. McKenzie on permanent

disability retirement. She has not been employed or capable of employment since." [*See* Doc. 1, ¶ 88].

II.

Defendant's Motion With Respect to the Qui tam Action

BellSouth first contends that this court has no subject matter jurisdiction over that part of the complaint relating to the *qui tam* allegations (Counts I-III). In particular, BellSouth relies on the following jurisdictional bar of the Act in support of this prong of its motion:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bring the action is an *original source* of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(A) and (B) (Supp. 1995) (emphasis added).[4] Based on the above language, BellSouth argues that the allegations relating to record falsification have already been publicly disclosed. Additionally, BellSouth maintains that Ms. McKenzie is not an "original source" within the definition of the Act. Because compliance with the above language by the relator is jurisdictional, *e.g., United States ex rel. Kreindler and Kreindler v. United Technologies Corporation*, 985 F.2d 1148, 1157 (2d Cir.), *cert. denied*, ____ *U.S.* ____, 113 S.Ct. 2962, 125 L.Ed.2d 663 (1993); *United States ex rel. Precision Company v. Koch Industries, Inc.*, 971 F.2d 548, 551 (10th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1364, 122 L.Ed.2d 742 (1993), the court must dismiss this case for lack of subject matter jurisdiction if there has been "public disclosure" unless Ms. McKenzie is an "original source of the information." 31 U.S.C. § 3730(e)(4)(A)(Supp. 1995).

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[4]The Sixth Circuit has recently observed:

> On October 27, 1986, Congress amended the Act. False Claims Amendment Act of 1986, Pub. L. 99-562, 100 Stat. 3153 (Oct. 27, 1986), now codified at 31 U.S.C. §§ 3729-3733 (1988). The amendments expand the circumstances under which citizens may bring suit on behalf of the Government, participate in the litigation, and recover a share of a judgment. The amendments change the Act's jurisdictional bar to provide that *qui tam* actions based on information that was publicly disclosed prior to initiation of the action will be barred unless the plaintiff who brings the action is an "original source" of the information underlying the complaint. 31 U.S.C. § 3730(e)(4)(A).

United States v. TRW, Inc., 4 F.3d 417, 419-20 (6th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1370, 128 L.Ed.2d 47 (1994).

III.

Public Disclosure

As the above statutory language indicates, the court's initial analysis must focus on whether there has been any "public disclosure of allegations or transactions" with respect to the designated categories; if there has been no "public disclosure," then the court need not reach the issue of whether Ms. McKenzie is "an original source of the information." *See, e.g., Cooper v. Blue Cross and Blue Shield of Florida*, 19 F.3d 562, 565 (11th Cir. 1994); *Wang v. FMC Corporation*, 975 F.2d 1412, 1416 (9th Cir. 1992). BellSouth contends that the original source requirement has been triggered because there has been public disclosure of all of McKenzie's allegations regarding record falsification in Tennessee in two other previously filed *qui tam* actions: (1) an action filed by Ronald D. Dorris against BellSouth Telecommunications, Inc., in the United States District Court for the Western District of Tennessee, Eastern Division, before the Honorable Julia S. Gibbons (the "*Dorris*" lawsuit");[5] (2) an action filed by Frank Falsetti and Nancy D'Alessio against Southern Bell Telephone and Telegraph Company, a division of BellSouth, in the United States District Court for the Northern District of Florida. Tallahassee Division, before the Honorable William

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[5]The appendix to BellSouth's motion to dismiss reflects that Mr. Dorris filed his original complaint on February 18, 1994, in the Circuit Court for Madison County, Tennessee [*see* Doc. 15, attachment 4, p.2.]. Defendant then removed the action to federal court on March 22, 1994 [*see id.*]. On June 16, 1994, plaintiff filed an amended complaint [*see id.*, attachment 2, p.5]. and on February 9, 1995, Judge Gibbons entered an order granting summary judgment in favor of defendant [*see id.*, attachment 4].

Stafford (the "*Falsetti* lawsuit").[6] BellSouth further contends that this public disclosure is also manifested in the newspaper articles discussing both the *Dorris* and *Falsetti* lawsuits.

The Sixth Circuit has not defined the phrase "public disclosure" within the meaning of the Act. Without question, the plain language of the Act includes public disclosure of allegations or transactions "from the news media." 31 U.S.C. § 3730(e)(4)(A). *See also U.S. ex rel. Taxpayers Against Fraud v. General Electric Company*, 41 F.3d 1032, 1039 n.8 (6th Cir. 1994). Furthermore, it is basically undisputed that allegations disclosed in prior litigation are publicly disclosed within the meaning of the Act. *See United States ex rel. Precision Company v. Koch Industries*, 971 F.2d at 553-54. Similarly, in *United States ex rel. Springfield Terminal Railway Company v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), the Court of Appeals for the District of Columbia Circuit held that discovery material, when filed with the court (and not subject to a protective order), is a sufficient public disclosure to trigger the original source requirement. *Id.* at 652. The Third Circuit has broadened its definition of public disclosure to encompass information produced through discovery whether or not it is filed with the court as long as no protective order has been entered. *United States ex rel. Stinson, Lyons, Gerland & Bustamante, P.A. v. Prudential Insurance Company*, 944 F.2d 1149, 1157-60 (3d Cir. 1991). In order to determine whether there has been public disclosure of the allegations of the instant case, the court must carefully examine the allegations set forth in the *Dorris* and *Falsetti qui tam* complaints, as well as the reports of those lawsuits in the news media. The allegations of the *Dorris* lawsuit will be examined first.

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[6]The appendix to BellSouth's motion indicates that this action was filed on November 6, 1991 [*see id.*, attachment 1]. The parties represented to the court during argument that this lawsuit is still pending.

A.

The Dorris Complaint

Mr. Dorris' amended complaint filed on June 16, 1994, alleges in part as follows:

> 11. In 1990, defendant South Central Bell, by and through its employees, defendant Matthew Chris Ishnall and T. G. Lewis, informed Plaintiff and other South Central Bell repair employees that they were to falsify cable records on repair orders, in order for the Jackson District of South Central Bell to adhere to the qualifications of the Tennessee Public Service Commission.
>
> 12. Plaintiff was "written-up" by defendant Mat[t]hews and subsequently had an entry placed in his personnel file by defendant Matthews because Plaintiff failed to falsify repair orders on a customer's outside phone line.
>
> 13. Plaintiff complained about the falsification of said cable codes to the Public Service Commission[.] Plaintiff drew further attention to the falsification of codes, fraud, the misuse of company funds, the misuse of public funds, and fraud towards the Public Service Commission, and the possibility of the involvement of some of the members of the Public Service Commission in said fraudulent practices.
>
> 14. Plaintiff was constantly harassed as a result of his efforts to expose

> such falsification of repair orders and other misdealings by defendant South Central Bell referred to in paragraphs 11 through 13 of this Complaint by Defendant Matthews and other supervisors and employees of South Central Bell.
>
> 15. Plaintiff was discharged by Defendant South Central Bell in retaliation for his efforts to expose said Defendant's fraud, [f]alsification of cable codes, and misuse of public funds.

[*See* Doc. 15, Appendix 3]. Mr. Dorris' allegations of fraud and falsification were reported in newspapers of general circulation throughout Tennessee. For example, *The Commercial Appeal* in Memphis reported a story on April 3, 1994, with the following headline:

FALSE SERVICE REPORTS FORCED AT BELL, EX-WORKER SAYS

The first paragraph of the article states:

> A former South Central Bell service technician has complained to state officials that Bell employees in Jackson are pressured to make false entries on service reports that, if widespread, could affect the company's financial picture at the Public Service Commission.

The text of the article included the following:

> The reports would make it appear that repairs were more expensive than they were and that telephone service was restored to customers

> earlier than it was, the ex-employee, Ronald D. Dorris of Jackson said.
>
> If such misreporting were widespread -- and there is no evidence of indication that it is -- it could have a slight impact on the company's state-regulated earnings, and thus, telephone rates, because the PSC monitors Bell's service standards and expenses, PSC officials said.
>
> . . .
>
> In other instances, employees said they were told to backdate reports, so that if a customer's telephone service repair was promised by 5 p.m. and the technician didn't complete the repair until 6 p.m., he would enter 4:55 p.m. on the report.
>
> . . .
>
> Under regulatory reforms adopted by the PSC in 1990, regulated utilities are allowed to earn revenue based partly on service standards, and at least two of the five service indices reviewed by the PSC could be affected by the kinds of reporting Dorris described: the percentage of repairs completed within 24 hours of a customer's complaint and installation of service within five days of an order.

[*See* Doc 15, Appendix 7]. Additionally, the article reported:

> PSC executive director Paul Allen turned the complaint over to Atty. Gen.

> Charles Burson for an inquiry upon the recommendation of PSC staffers who reviewed Dorris's complaint. Mary Parker, spokesman for the Attorney General's Office, said she could neither confirm nor deny that it is looking into the complaint, although Dorris said he was interviewed for nearly two hours by Deputy Atty. Gen. Stephen Hart, head of the office's consumer affairs division.

[*See* Doc. 15, Appendix 7]. On April 4, 1994, the next day, *The Chattanooga Times* reported a similar story with a headline of "EX-BELL WORKER SAYS REPORTS FALSIFIED" and a sub-headline of "Service List Raised Costs, He Claims." [*See id.*]

After filing his complaint, Mr. Dorris was deposed by BellSouth's counsel. In his deposition of May 17, 1994, Mr. Dorris testified about his meeting with a Public Service commissioner, stating: "Myself and six other members sat and had an hour talk with the Commissioner, Frank Cochran, about all of the things that I brought forth, fraud, misuse, and falsifying company records." [*See* Doc. 15, Appendix 6, pp. 120-21]. Mr. Dorris also stated that he filed a formal complaint with the PSC:

> I know for a fact that Mr. Cochran -- when I filed a formal complaint with the PSC sometime in December, I talked with the director, Mr. Eddie Robinson. He met with the other five directors, mulled over my accusations, and he said there is sufficient reason to have an investigation.

[*See id.*, p.121]. Mr. Dorris further claimed that the directors of the PSC, as well as its commissioners, had requested that the Tennessee Attorney General's Office begin an

investigation [*see id.*, p.122]. Mr. Dorris also described how he spoke with the State Attorney General and indicated that he had given a recorded statement [*see id.*]. Mr. Dorris' deposition excerpts were filed with the district court on August 1, 1994 [*see* Doc. 15, Appendix 2, p.5].

Finally, it must be noted that when the district court granted summary judgment in BellSouth's favor, it described plaintiff's claims as being "discharged in unlawful retaliation for his attempts to expose defendant's 'various acts of fraud, falsification of cable codes, and misuse of public funds.'" [*See id.*, Appendix 4, p.4]. More specifically, the district court indicated that plaintiff's discharge was "because he and six other employees reported defendant's illegal activity to the Tennessee Public Service Commission." [*See* Doc. 15, Appendix 4, p.8].

B.

The Falsetti Complaint

As previously noted, the *Falsetti qui tam* lawsuit was brought in Tallahassee, Florida, in July 1991 against Southern Bell Telephone and Telegraph Company, a division of BellSouth. The allegations against BellSouth in the Florida *qui tam* complaint appear to be virtually identical to those made in the instant case. Among those allegations are the following:

> 25. Telephone repair records were knowingly altered in various ways by Southern Bell managers and employees, including:
>
> (a) systematically misclassifying telephone lines as "In Service" or "Affecting Service" when in fact the telephone lines

were actually Out of Service" ("Affecting Service" refers to a problem such as static on the line which does not cause a complete interruption of service. Troubles reported as "Affecting Service" are not governed by the 24-hour repair requirement or the 24-hour refund rule.);

(b) systematically misclassifying telephone lines as "Out of Service" and repaired within the specified period (24 hours or less) when in fact they should have been classified as "Affecting Service." This type of misclassification was used to improve the indexes by representing that more repairs were made within the required period (24 hours or less) than were actually repaired;

(c) systematically reporting that service was restored within a specified period (24 hours or less) when in fact service was not restored within the required period;

(d) systematically reporting that subscribers were contacted and that they had granted extensions of time for Southern Bell to make repairs when in fact the subscribers had not been contacted and/or did not agree to the requested extension;

(e) systematically reporting that telephone repair technicians were denied access to the subscriber's premises to restore service when in fact no repair technician was dispatched to the premises in time to meet the service restoration requirement; and

> (f) systematically misclassifying reports of trouble on telephone lines as having initially been reported by Southern Bell employees, when in fact, the initial reports were actually made by a subscriber. In certain instances, employee reports were not covered by the 24 hour repair rule, and/or do not show up in the various indexes.
>
> 26. Southern Bell managers routinely directed their subordinates to falsify records by posting such directions on blackboards or bulletin boards, by passing handwritten notes to individual employees responsible for recording Trouble Reports, by passing out memoranda instructing employees how and when to falsify Trouble Reports, in face-to-face conversations with employees responsible for recording Trouble Reports, and through office-wide announcements during a work shift. Employees who either refused to falsify records and reports, or complained of the practice, at times, were subjected to disciplinary action and/or threats of disciplinary action.

[*See* Doc. 15, Appendix 1]. In conjunction with the *Falsetti* litigation, David Long, an attorney with the United States Department of Justice in Washington, D.C., in the Civil Fraud Section involved in False Claims Act litigation, was deposed on October 15, 1992. [*See id.*, Appendix 9]. Mr. Long specifically testified that he met with Bradley Weiss, an attorney for Mr. Falsetti, in the spring of 1990 on at least two occasions [*see id.*, p.26]. During the course of those meetings, Mr. Weiss described the alleged fraud being perpetrated by

Southern Bell Telephone & Telegraph Company throughout the Southeast. Mr. Long summarized those allegations as follows:

> To the best of my recollection, it had to do with alleged fraud by Southern Bell in not crediting, properly crediting customers for amounts due when phone service was out more than 24 hours.

[*See id.*]. Again, the instant complaint indirectly references the *Falsetti* complaint in ¶ 82 in which it is alleged that, "Ms. McKenzie also showed Ms. Crum a copy of a newspaper article about a similar fraud being perpetrated by the telephone company in Florida." [*See* Doc. 1, p.28].

In an effort to circumvent the impact of the *Dorris* and *Falsetti qui tam* complaints, as well as reports of those lawsuits by the news media, on the issue of whether any "public disclosure" has occurred, Ms. McKenzie raises several arguments. None has merit. Turing first to the *Dorris* lawsuit, plaintiff's response is in part as follows:

> South Central Bell suggests that Ronald Dorris, a former South Central Bell employee from Jackson, Tennessee, has already attempted to pursue the Government's claims for fraud against South Central Bell and that his complaint and two articles published in Western Tennessee newspapers regarding his complaint have given a full airing to the various frauds committed by South Central Bell against the Government at issue here. Such could not be further from the truth.

[*See* Doc. 22, p.7]. In the court's opinion, what is a far cry from the plaintiff's description of BellSouth's position with

respect to the significance of the *Dorris* lawsuit. In no way does BellSouth intimate that Mr. Dorris has attempted to pursue the government's claims for fraud against it or that his complaint and the attendant news coverage has fully disclosed the alleged fraud committed by BellSouth against the government. Moreover, any such discussion with respect to these issues would sidestep completely the analysis needed to determine whether or not there has been public disclosure.

All that BellSouth must show in order to trigger the original source requirement is public disclosure of "allegations or transactions" -- not information -- similar to those in the instant complaint. 31 U.S.C. § 3730(e)(4)(A). Any discussion of the information which Ms. McKenzie possesses compared to the information which Mr. Dorris possesses has no relevance to the discussion at this juncture. The court's inquiry with respect to public disclosure must focus on whether the substance of Ms. McKenzie's allegations against BellSouth have already been publicly disclosed. Nothing else is required at this point.[7]

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[7]The Ninth Circuit made the following observations with respect to the distinction between "publicly disclosed information" and "the public disclosure of allegations or transactions":

> Courts sometimes speak loosely of barring a qui tam suit because it is based on "publicly disclosed information." ... . But the Act bars suits based on publicly disclosed "allegations or transactions," not information. 8 [sic] U.S.C. § 3730(e)(4)(A). The point is not mere semantics: the Act distinguishes between "allegations" and the "information on which the allegations are based." 8 [sic] U.S.C. § 3730 (e)(4)(B). The Act appears to be invoking the common logical distinction between an assertion and its proof. Although not empty, this distinction rarely matters in applying the Act, because where the public knows of information proving an allegation, it

The court readily agrees with Ms. McKenzie that the focus of the *Dorris* litigation differs from the focus of the instant litigation. Mr. Dorris' lawsuit primarily claims that he was "discharged in unlawful retaliation for his attempts to expose [BellSouth's] 'various acts of fraud, falsification of cable codes, and misuse of public funds.'" [*See* Doc. 15, Appendix 4, p.4.] Thus, on the face of it, the thrust of Mr. Dorris' lawsuit is about his discharge from BellSouth -- not about BellSouth's alleged unlawful activities. Mr. Dorris' suit is not a *qui tam* action. Nevertheless, a comparison of the central allegation of Ms. McKenzie's *qui tam* complaint and the press report in the *Commercial Appeal* of Mr. Dorris's

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> necessarily knows of the allegation itself. But the reverse is not always true. An allegation can be made public, even if its proof remains hidden. No doubt when courts speak of "publicly disclosed information," they mean both the allegation of fraud and all information proving the allegation that has made its way to the public. In Wang's case, as in the typical qui tam suit, the distinction between an allegation and its proof makes little difference: it is undisputed that both Wang's allegation and most of its supporting information have been publicly disclosed.

Wang v. FMC Corporation, 975 F.2d at 1418. This distinction is of some significance in the instant case. At times, plaintiff appears to argue that she has information which is unique, so that there could have been no previous public disclosure of that information. But, as can be seen from the above analysis by the Ninth Circuit in *Wang*, whether or not there has been a public disclosure of this information makes not difference with respect to whether or not there has been "public disclosure of allegations or transactions ... ." If Ms. McKenzie has information which she and she alone possesses with respect to fraud perpetrated by BellSouth against the government, then a discussion of this information would be germane to the court's analysis of whether or not Ms. McKenzie is an "original source of information" within the meaning of the Act. It would not be, however, germane to a discussion of whether or not a public disclosure of the allegations has occurred.

lawsuit reveals the common thread of similar allegations of fraud in both cases. Again, Ms. McKenzie's central allegation is that, between 1977 and 1992, BellSouth:

> conspired with and through its employees and agents to defraud its subscribers including the Government, by falsely representing to the Commission's and to [BellSouth's] subscribers that [BellSouth] met the quality and level of telephone service required by the tariffs, regulations, and Contracts, that customers were properly being billed for services actually provided, and that refunds were being made when due.

[Doc. 1, ¶ 18]. Also, according to Ms. McKenzie, telephone repair records were knowingly and systematically altered by BellSouth's managers and employees in the following manner:

> 1. Misclassifying telephone lines as "In Service" or "Affecting Service" when they were actually "Out of Service." This type of falsification was used to avoid paying refunds of SCB's [BellSouth's] subscribers when they were in fact due;
>
> 2. Reporting the service was restored to "Out of Service" lines within the specified period (24 hours or less), when in fact service was not restored within the required period. This type of falsification was used to avoid paying refunds to SCB's [BellSouth's] subscribers when they were in fact due;
>
> 3. Reporting that telephone repair technicians were denied access to the

> subscriber's premises to restore service when in fact no repair technician was dispatched to the premises in time to meet the 24-hour service restoration requirement. This type of falsification was used to avoid paying refunds to SCB's [BellSouth's] subscribers when they were in fact due;
>
> 4. Misclassifying reports of trouble on telephone lines as having initially been reported by SCB [Bell South] employees, when in fact the initial reports were made by a subscriber ... . This type of falsification was used to avoid paying refunds to SCB's [BellSouth's] subscribers when they were in fact due; and
>
> 5. Misclassifying telephone lines as "Out of Service" and repaired within the specified period (24 hours or less) when in fact they should have been classified as "Affecting Service." This type of misclassification was used to improve the indices, and thus misrepresent to the Commissions and to SCB's [BellSouth's] subscribers the level of service being provided, by representing that more repairs were made within the required period (24 hours or less) than were in fact required.

[*See* Doc. 1, ¶23]. The text of the newspaper article about the *Dorris* lawsuit, previously set forth *supra* in greater detail, includes the following:

> The reports would make it appear that repairs were more expensive than they were and that telephone service was restored to customers

> earlier than it was, the ex-employee Ronald D. Dorris of Jackson said.
>
> . . .
>
> In other instances, employees said they were told to backdate reports, so that if a customer's telephone service repair was promised by 5 p.m. and the technician didn't complete the repair until 6 p.m., he would enter 4:55 p.m. on the report.

[*See* Doc. 15, Appendix 7 (news clippings from *The Commercial Appeal* from Memphis, Tennessee, dated April 3, 1994)].

Ms. McKenzie attempts to distinguish Mr. Dorris' allegations based on the fact that Mr. Dorris did not specifically allege that customers may have been denied a refund if their telephones were out of service for more than 24 hours. The court agrees with BellSouth that such a distinction is meaningless for purposes of the Act. Mr. Dorris alleges that BellSouth employees were reporting that repairs were completed within 24 hours when they were not. That being the case, the Tennessee Public Service Commission provides for refunds upon the request of the customer for out-of-service conditions existing for more than 24 hours. The court does not view the allegation that customers may have been denied a refund if their telephones were out of service for more than 24 hours as a necessary component of the underlying allegation of fraud in the instant case. To the contrary, once the allegation has been made that BellSouth employees were not repairing telephone lines in 24 hours, but reporting them as having been completed in that time frame, then the customer's right to refund exists *a fortiori*.

One court of appeals has described the meaning of public disclosure in terms of an algebraic equation:

> [A]t the risk of belabored illustration, if X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed. The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transactions themselves were in the public domain.

United States ex rel. Springfield Terminal Railway Company v. Quinn, 14 F.3d at 654. Applying the above formula to the facts of this case is fatal to Ms. McKenzie's complaint. Clearly, both the allegations of records falsification relating to reporting out-of-service telephone lines as being repaired within 24 hours when they were not (Element X), as well as the refund rule of the Tennessee Public Service Commission (Element Y), were publicly disclosed prior to Ms. McKenzie's complaint being filed. Anyone could therefore draw the inescapable conclusion that a fraud had allegedly been committee by BellSouth on its customers, including perhaps the government, prior to the filing of Ms. McKenzie's complaint.

Furthermore, even if the court were to embrace Ms. McKenzie's rationale that the *Dorris* case does not encompass the allegations of fraud present in her *qui tam* complaint, the *Falsetti qui tam* complaint presents an even more formidable, if not impossible, jurisdictional hurdle for Ms. McKenzie. The court need not recapitulate the allegations of the *Falsetti*

complaint because they have been set forth in great detail previously. Moreover, it would serve no practical purpose because Ms. McKenzie does not dispute the same general allegations of fraudulent conduct which she makes against BellSouth were, in fact, made to the United States Department of Justice in early 1991 by the attorney representing Mr. Falsetti. Ms. McKenzie does, however, raise several arguments to avoid the ramifications of the *Falsetti* allegations. All are unavailing.

Ms. McKenzie first argues that the *Falsetti* action was not brought against BellSouth, but only against Southern Bell, which she claims is "another operating division of BellSouth Telecommunications, Inc. ... ." [*See* Doc. 22, p.9]. However, it appears that while Southern Bell was formerly a division of BellSouth Corporation, Southern Bell and South Central Bell were merged on January 1, 1992, resulting in the creation of BellSouth Telecommunications, Inc. [*See* Doc. 24, Ex. B.]. It further appears that, since that time, BellSouth has done business as both Southern Bell and South Central Bell, although it is the same corporation [*see id.*]. Thus, the court concludes that the allegations raised in the *Falsetti* complaint and those raised by the instant complaint are both claims against BellSouth.[8]

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[8]Even if the claims in the *Falsetti* case were against an entirely different entity than those raised by Ms. McKenzie's complaint, the court would, nevertheless, be reluctant to hold that either entity could not prevail as to its arguments that they were the same "allegations" for purposes of § 3730(e)(4)(A), as long as these "allegations" set forth the same or a similar scheme of fraudulent conduct. Based on the fact that the allegations in the *Falsetti* case and the allegations in the instant case are against what is, in effect, the same entity, the court does not need to reach this issue, however.

Ms. McKenzie next attempts to distinguish the *Falsetti* action by insisting that she is alleging record falsification by BellSouth employees in Tennessee while Mr. Falsetti is alleging record falsification by BellSouth employees in Florida. If the court were to be persuaded by this prong of plaintiff's argument, then relators could pursue separate *qui tam* actions, under similar factual scenarios, against BellSouth in any other state except Florida.[9] In other words, Ms. McKenzie attempts to carve out some sort of "geographic exception" to the definition of pubic disclosure under the Act. She cites no authority for such a proposition. Furthermore, even if there were persuasive authority to do so, this court would not be included to follow it. Given the modern-day realities that the allegations of a *qui tam* complaint, wherever files, may be immediately transmitted to any law office in the United States after filing, the court is included to interpret "public disclosure" in the Act very broadly. Thus, the allegations of a *qui tam* complaint filed in Florida have been, for purposes of the act, publicly disclosed in Tennessee. To hold otherwise would allow, if not encourage, a profusion of parasitic actions which would defeat the Act's goal of

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[9]Arguably, the allegations of the *Falsetti* action encompasses BellSouth's operations in three other states: Georgia, North Carolina, and South Carolina [*see* Doc. 15, Appendix 1. ¶ 10]. If so, then the court would interpret Ms. McKenzie's argument on this point as saying that a relator can bring a lawsuit, based on similar allegations against BellSouth, in any other state except Florida, Georgia, North Carolina, and South Carolina. Thus, Ms. McKenzie's complaint would not be barred because Tennessee is not included in the expanded group of states encompassed by the *Falsetti* case.

"inducing 'whistleblowers' to step forward ... ." *United States ex rel. Taxpayers Against Fraud*, 41 F.3d at 1035.[10]

Ms. McKenzie's third argument in support of her position that there has been no public disclosure under the Act is based upon a recent decision by the Court of Appeals for the Fourth Circuit. In *United States ex rel. Siller v. Becton Dickinson & Company*, 21 F.3d 1339 (4th Cir.), *cert. denied*,

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[10]Furthermore, even if the court were to adopt Ms. McKenzie's "geographic exception" argument, it would be unavailing under the facts of this case. As previously set forth in great detail, Mr. Dorris has alleged that BellSouth employees were falsifying their records in the State of Tennessee, the very same state where Ms. McKenzie has filed her *qui tam* action. Additionally, it appears that Ms. McKenzie believes that if this court allows litigation in this region of the country to preclude litigation in any other region of the country based on the "public disclosure" language of the Act, then the pendency of this case "would give South Central Bell *carte blanche* to commit fraud anywhere else it does business, without fear of suit." [See Doc. 22, p.10]. However, Ms. McKenzie's fear that the court's refusal to carve out a geographic exception would result in more fraud by BellSouth is totally unfounded. The Act clearly allows any court to exercise jurisdiction over an action brought by the Attorney General, even if public disclosure of the very same allegations has already occurred. Thus, the jurisdictional bar of § 3730(e)(4)(A) cannot prevent the Attorney General from bring this action in East Tennessee, even though the *Falsetti* action is pending in Florida and the *Dorris* action is pending in West Tennessee. Here, the Attorney General declined to intervene [*see* Doc. 8], although he has requested, and been allowed by the court, to be served with copies of all pleadings and orders [*see* Doc. 90.

___ U.S. ___, 115 S.Ct. 316, 130 L.Ed.2d 125 (1994), an employee of Scientific Supply, Inc. ("SSI"), filed a *qui tam* suit against Becton Dickinson & Company ("BD"), whose products SSI distributed, alleging that BD overcharged the government for those products. BD moved to dismiss, arguing that the *qui tam* suit was "based upon" a previous lawsuit filed by SSI against BD, in which SSI had outlined the fraud allegedly being committed by BD on the government. The district court dismissed the case; however, on appeal, the Fourth Circuit reversed, stating:

> We agree that Siller's reading of "based upon" as meaning "derived from" is the only fair construction of the statutory phrase. Section 3730(e)(4)(A)'s use of the phrase "based upon" is, we believe, susceptible to a straightforward textual exegesis. To "base upon" means to "use as a basis for." *Webster's Third New International Dictionary*, 180 (1986) (definition no. 2 of verb "base"). Rather plainly, therefore, a relator's action is "based upon" a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based. Such an understanding of the term "based upon," apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s indisputed objective of preventing " parasitic" actions, *see, e.g., Stinson United States ex rel. Stinson, Lyons, Gerlin and Bustamante, P.A. v. Prudential Insurance Company*, 944 F.2d 1149, 1160-61 (3d Cir. 1991), *supra*, at 1154, for it is self-evident that a suit that includes allegations that happen to be similar (even

> identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

21 F.3d at 1348. Thus, under *Siller*, plaintiff argues that her case should not be jurisdictionally barred by this section of the Act because her complaint is not "based upon" any public disclosures made in connection with either the *Dorris* or the *Falsetti* cases. In support of that argument, Ms. McKenzie has filed her affidavit in which she testifies that her allegations are based upon her own experiences as an employee of South Central Bell [*see* Doc. 22, Ex. A].

Nevertheless, the court finds that Ms. McKenzie's argument on this point fails for two reasons. First, this court declines to adopt the Fourth Circuit's substitution of the phrase "derived from" for the statutory language "based upon." *See United States ex rel. Doe v. John Doe Corporation*, 960 F.2d 318, 324 (2d Cir. 1992) (Court held that a *qui tam* plaintiff's action is "based upon" a public disclosure where the relator's allegations are "the same as those that ha[ve] been publicly disclosed ... regardless of where the relator obtained his information."); *see also United States ex rel. Precision Company v. Koch Industries*, 971 F.2d 552)"'based upon' is properly understood to mean 'supported by'").

Moreover, even if the court were to agree with the Fourth Circuit's interpretation of "based upon," it would be of no benefit to this particular plaintiff, her affidavit notwithstanding, because the allegations of Ms. McKenzie's complaint appear to be in part "derived from" the allegations of the *Falsetti* case. Paragraph 82 of the instant complaint describes an incident that occurred on or about January 20, 1992, a few days before Ms. McKenzie became permanently disabled. On that day, Ms. McKenzie alleges that she "showed Ms. Crum a copy of the newspaper article about a

similar fraud being perpetrated by the telephone company in Florida." [*See* Doc. 1, ¶ 82]. Therefore, by plaintiff's own admission, this lawsuit is in part "derived from" the *Falsetti* case and, thus, in the court's opinion, is somewhat parasitic. Therefore, the court finds that there has been public disclosure to the extent that Ms. McKenzie must demonstrate that she is an "original source."[11]

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[11]During oral argument, it was also plaintiff's position that BellSouth should be estopped from now contending that the allegations in the *Falsetti* case are comparable to those in the instant case because of countervailing arguments made by BellSouth in the *Falsetti* case. Specifically, plaintiff says that BellSouth's attorneys and, in particular, Robert J. Winicki, who is making an appearance for BellSouth in both cases, argued to Judge Stafford about how the two cases differ: yet, Mr. Winicki argues to this court about how remarkably similar these two cases are. In support of plaintiff's position on this issue, plaintiff's counsel, after argument, provided to the court a copy of a transcript of a hearing before Judge Stafford on July 25, 1995. The court has now carefully reviewed that transcript. Plaintiff is correct that Mr. Winicki did emphasize the differences between the Florida litigation and the Tennessee litigation to Judge Stafford; however he did so with respect to a discovery motion. In Florida, Mr. Winicki is attempting to restrict plaintiff's discovery to as few states as possible because of the volume of documents involved and because of the expense to his client. In doing so, Mr. Winicki argues that the refund rule in Florida is different from the refund rule in a number of other states, including Tennessee. Apparently in Florida, if the telephone lines are out of service for more than 24 hours, then a customer is entitled to an automatic refund. Here, in Tennessee, when a telephone line is out of service for more than 24 h ours, the customer will not get a refund unless he or she requests it. Thus, the court is of

IV.

"Original Source"

Having concluded that there has been a public disclosure of the allegations set forth in the pending complaint, the court must next turn to the question of whether Ms. McKenzie is an "original source." If she is, then this court has jurisdiction over this matter. If not, then this case must be dismissed. Again, an "original source"

> means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3720(e)(4)(B) (Supp. 1995). Here, BellSouth does not contend that Ms. McKenzie is barred because she has not voluntarily provided the information to the government; rather, BellSouth insists that Ms. McKenzie does

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the opinion that this distinction, which represents a legitimate argument for discovery purposes, does not require the court to disregard BellSouth's argument on the legal issues regarding the underlying allegations in each complaint. The court is still of the opinion that the allegations of the instant case are remarkably similar to the allegations in the *Falsetti* complaint. BellSouth should therefore not be estopped from relying on those similarities simply because its counsel has pointed out to the district court in Florida the differences in the respective refund rules of each locale for purposes of restricting plaintiff's discovery in Florida.

not have "direct and independent" knowledge about fraud involving the government.[12]

In constructing the phrase "original source," a number of courts have interpreted the statutory definition to impose a conjunctive requirement -- direct knowledge *and* independent knowledge -- on *qui tam* plaintiffs. *See United States ex rel. Springfield Terminal Railway Company*, 14 F.3d at 656; *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A.*, 944 F.2d at 1160; *United States ex rel. Dick v. Long Island Lighting Company*, 912 F.2d 13, 16 (2d Cir. 1990); *Houck v. Folding Carton Administration Committee*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026, 110 S.Ct. 1471, 108 L.Ed.2d 509 (1990). This court further agrees that the word "direct" signifies "marked by absence of an

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[12]In view of Ms. McKenzie's affidavit filed in response to defendant's motions [*See* Doc. 22, Ex. A], any argument to the effect that Ms. McKenzie has not voluntarily provided the information to the government would have to be rejected. Specifically, Ms. McKenzie testifies as follows:

. . .

> 4. In October 1994, pursuant to my instructions, my attorneys, Thomas Lorenzen and Ronald Zuker, contacted Assistant United States Attorney Greg Weddle of the United States Attorney's Office in Knoxville, Tennessee, to tell the government what I knew about South Central Bell and to offer my cooperation in any investigation of South Central Bell's practices.

[*See* Doc. 22, Ex. A, p.1-2].

intervening agency," *see Stinson*, 944 F.2d at 1160, and that the phrase "independent knowledge" is knowledge that is not itself dependent on public disclosure. *See Houck*, 881 F.2d at 505. Additionally, it must be emphasized that the "original source" provision requires the relator to possess direct and independent knowledge of the "information" underlying the allegation or transaction, as opposed to possessing direct and independent knowledge of the "allegations or transactions ... ." *See, e.g., United States ex rel. Springfield Terminal Railway*, 14 F.3d at 656.

Finally, in outlining the parameters of who is or is not an original source, it is noteworthy that some circuits have imposed an additional requirement. Thus, the Ninth Circuit has adopted the following test to determine whether the original source requirement of the 1986 amendments to the Act have been met:

> This court has held that in order to be an "original source," a *qui tam* relator must allege that the (1) has direct and independent knowledge of the information, (2) voluntarily provide the information to the government, and (3) *either directly or indirectly assisted in the public disclosure of the information.*

United States ex rel. Fine v. Chevron U.S.A., Inc., 39 F.3d 957, 961 (9th Cir. 1994) (quoting *Chen-Chen Wang ex rel. United States v. FMC Corporation*, 975 F.2d 1412, 1419 (9th Cir. 1992) (emphasis added)). The Second Circuit has adopted this same test, specifically holding that, "there is an additional requirement that a *qui tam* plaintiff must meet in order to be considered an 'original source,' namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." *United States of America ex rel. Dick*, 912 F.2d at 16.

The Sixth Circuit has not yet addressed this particular issue. This court is of the opinion that when the Sixth Circuit does so, it will probably adopt the rationale of the Second and Ninth Circuits. The court's prediction on this point is based upon the following language from the Sixth Circuit in its recent decision in *United States ex rel. Taxpayers Against Fraud*:

> ... the relator must be a true "whistleblower"; therefore he is precluded from collecting a bounty if the case is brought on the basis of information that has already been publicly disclosed, *id.* § 3730(e)(4), or if someone else has filed that claim first. *Id.* § 3730(b)(5). The FCA *qui tam* statutes also contain a fee-shifting provision that aims at inducing "whistleblowers" to step forward and attorneys to pursue such actions.

41 F.3d at 1035. It is difficult for this court to understand how someone can be a "true 'whistleblower'" unless that individual either directly or indirectly assists in the public disclosure of the information. If this stringent standard is applied to the facts of this case, then under no circumstances can Ms. McKenzie be considered a "true 'whistleblower'" because she waited more than three years after the *Falsetti* case was filed in Florida to bring similar allegations in Tennessee. Likewise, the amended complaint filed by Mr. Dorris in Tennessee also casts considerable doubt on Ms. McKenzie's efforts to label herself as a "true 'whistleblower'."

Furthermore, even assuming that the Sixth Circuit does not adopt the more stringent standard of the Second and Ninth Circuits, Ms. McKenzie would still be unable to meet the statutory requirements of an original source: (1) providing information that is direct; and (2) providing information that is independent. Ms. McKenzie's argument that she meets the

two requirements is belied by the allegations of the complaint itself. Furthermore, Ms. McKenzie's affidavit, filed in response to BellSouth's motions, does not resurrect her allegations to a point sufficient to cross the jurisdictional barrier erected by § 3730(e)(4)(A).

At the outset, the court acknowledges that plaintiff does possess direct knowledge of certain information with respect to activities by BellSouth's employees. In her affidavit, she testifies:

> 3. ... my supervisors, including Freddy Waters and Martha Ann Pierce, repeatedly ordered me and other South Central Bell employees to alter Trouble Reports, including Trouble Reports relating to Government telephone lines, to make it appear that telephone lines were not out-of-service when in fact they were; or to make it appear that those lines had been repaired within 24 hours of a customer's complaint, when in fact they had not been; or to make it appear that South Central Bell's repair technicians had been denied access to make repairs, when in fact they had never even been dispatched.

[*See* Doc. 22, Ex. A]. Nevertheless, this testimony does not transform Ms. McKenzie's allegations to those necessary to reflect knowledge of information which is "direct and independent." The court has carefully reviewed plaintiff's complaint and can find nothing which indicates direct knowledge of fraud perpetrated upon the government. It is at best a possible inference which could be drawn, and at worst outright speculation. All of Ms. McKenzie's allegations regarding alleged falsification of government records is based upon "information and belief" as opposed to knowledge which

is "direct and independent."[13] In fact, Ms. McKenzie does not allege even one single instance in which a falsified record went to the government, upon which the government relied in paying funds to BellSouth. Likewise, she does not allege one instance in which the government requested a refund, which was denied.[14] Ms. McKenzie has no personal knowledge of the specific time, place, or content of any fraud perpetrated by BellSouth upon the United States government. Ms. McKenzie's knowledge is anything but direct. She has direct knowledge of false reports because she saw it with her own eyes. But, Ms. McKenzie makes no allegation that she has personally observed any fraud perpetrated upon the government. In fact, Ms. McKenzie admits in her complaint that service problems experienced by the government were handled by a special "on-site representative" of BellSouth -- it was not handled either by her or by the department where she worked [*see* Doc. 1, ¶ 38]. Thus, Ms. McKenzie's knowledge cannot even be held to be indirect -- she simply has no knowledge of it whatsoever.

---

[13]*See* Doc. 1, ¶¶ 5, 30, 38, 39, 49, 50, 51, and 65.

[14]The court recognizes, of course, that these deficiencies in the complaint were raised by BellSouth's motion to dismiss for failure to state a claim upon which relief may be granted. [Doc. 13]. While the court has previously stated that it is of the opinion that this motion will be moot because the court will grant defendant's motion to dismiss for lack of subject matter jurisdiction [Doc. 11], it is also of the opinion that some of the arguments raised in BellSouth's memorandum in support of its motion to dismiss are relevant on the issue of whether Ms. McKenzie had knowledge which was "direct and independent."

Similarly, the court finds that the complaint is devoid of any allegations from which the court could conclude that Ms. McKenzie has "independent" knowledge that the government was being defrauded. As previously noted, the work "independent" means "knowledge that is not itself dependent upon public disclosure." *United States ex rel. Springfield Terminal Railway*, 14 F.3d at 656 (citing *Houck on behalf of United States*, 881 F.2d at 505). Here Ms. McKenzie's claim that the falsification of repair records resulted in a fraud upon the government appears to be completely dependent upon her review of the newspaper article concerning the fraud claims in the *Falsetti* case in Florida. Perhaps the most that can be said about Ms. McKenzie is that she possessed information about the alleged falsification of repair records which then became significant when she read this newspaper article. Her knowledge is therefore dependent, which precludes Ms. McKenzie from being an original source.

Thus, the court concludes that it is without jurisdiction to entertain Ms. McKenzie's *qui tam* complaint because there has been public disclosure of the allegations of this action and because Ms. McKenzie cannot escape this jurisdictional bar by qualifying herself as an original source who possesses the requisite "direct and independent knowledge of the information on which the allegations are based. ... " 31 U.S.C. § 3720(e)(4)(A) and (B). In so ruling, the court is mindful that the purpose of the Act is to encourage a "true 'whistleblower'" to come forward. *See United States ex rel. Taxpayers Against Fraud*, 41 F.3d at 1035. As observed by the Ninth Circuit in the *Wang* case:

> This interpretation of Congress' intent [with respect to the 1986 amendments to the Act] accords with the Act's purpose of encouraging "private individuals who are

> aware of fraud being perpetrated against the government to bring such information forward" ... because the interpretation:
>
> > is most likely to bring 'wrongdoing to light' since, by barring those who come forward only *after* public disclosure of possible False Claims Act violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time.
>
> ... This paradigm *qui tam* plaintiff is the "whistleblowing insider." *Stinson*, 944 F.2d at 1160. *Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot.

Wang, 975 F.2d at 1419 (some citations omitted). In this case, Ms. McKenzie waited some three years after the Falsetti case was filed in Florida and some six months after the amended complaint was filed in the *Dorris* litigation in Tennessee before filing this complaint. Equally important, Ms. McKenzie did anything but come forward at the earliest opportunity. Rather, she waited until after she was terminated by BellSouth before bringing these matters to the government's attention. And yet, the allegations of the complaint indicate that Ms. McKenzie believed that BellSouth (or South Central Bell) was engaging in fraudulent conduct as early as 1977 [*see* Doc. 1, ¶18]. Under these circumstances, to retain jurisdiction over this *qui tam* action would be

tantamount to rewarding a second or even a third "toot." This the court will not do.

V.

Plaintiff's Retaliation Claim

Ms. McKenzie's last claim for relief (Count IV) alleges retaliatory discharge by BellSouth in violation of § 3730(h) of the Act.[15] This "whistleblower" provision of the Act prevents generally the harassment, retaliation, or threatening of employees who assist in or bring *qui tam* actions. The legislative history makes clear that a "whistleblower must show the employer had knowledge the employee engaged in 'protected activity.'" S. Rep. No. 345, 99th Cong., 2d Sess. 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300. Thus, a court must determine whether the record supports an inference that: (1) a plaintiff engaged in protected activity; and (2) that defendant knew about it. *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1110, ___ L.Ed.2d ___, (1995).

However, before reaching these two issues, the court initially observes that if Ms. McKenzie is not a true whistleblower, then it naturally follows that this provision of the Act cannot afford her any relief. For the reasons set forth previously, the court has already held that Ms. McKenzie is not a true whistleblower; therefore, she is entitled to no relief under this section of the Act.

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[15]This sub-section is set forth in footnote 3, *supra*.

Moreover, there is no allegation in the complaint that Ms. McKenzie engaged in any protected activity. Ms. McKenzie's complaint alleges a general retaliation against her based upon her refusal to falsify records. For example, her complaint alleges that "SCB [BellSouth] employees, including Ms. McKenzie, who refused to falsify records and reports, or complained of the practice to their supervisors, were at times subjected to disciplinary action or threats of disciplinary action, as well as verbal harassment." [*See* Doc. 1, , ¶ 43]. Likewise, the allegations in Count IV outline retaliation claims that Ms. McKenzie was disciplined, reprimanded, and terminated because she refused to engage in falsification in general [*see* Doc. 1, ¶ 73-90]. It must be emphasized that there is no specific allegation that Ms. McKenzie was terminated because she blew the whistle on any falsifications involving the United States government. In the *Robertson* case, the Fifth Circuit suggested that an employee who had not used a term such as "illegal," "unlawful," or "*qui tam* action" in characterizing his concerns to his or her employer had not engaged in reporting which was protected under the Act. 32 F.3d at 951. Here, Ms. McKenzie fails to allege that she did anything other than object to filing what she believed were false reports to customers in general and then complaining to supervisors about these practices of BellSouth. This is not sufficient to invoke the retaliation provision of the Act because plaintiff has not engaged in a protected activity. That being the case, the court likewise concludes that BellSouth could not be cognizant that plaintiff was engaged in a protected activity. This final claim too must therefore be dismissed.[16]

---

[16]In view of the court's disposition of the retaliation claim, the court declines to consider whether this claim is pre-empted by the NLRA.

Order accordingly,

s/James J. Jarvis

James H. Jarvis
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 19 1997
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No. 97-850

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

United States of America ex rel. McKenzie,
Petitioner

v.

BellSouth Telecommunications, Inc.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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PARTIES TO THE PROCEEDING

BellSouth Telecommunications, Inc. ("BellSouth") is a wholly owned subsidiary of BellSouth Corporation, which is a publicly traded corporation that is a parent to a number of subsidiaries, all of which are wholly owned.

The other party to the proceeding is Mary C. McKenzie, as set forth on page ii of her certiorari petition brief.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OMISSIONS AND INACCURACIES IN McKENZIE'S STATEMENT OF THE CASE

BellSouth provides telephone service in nine southeastern states, including Tennessee where McKenzie was employed. In March of 1992, at the time of McKenzie's placement on permanent disability leave from her employment, BellSouth had two divisions, Southern Bell and South Central Bell. *United States ex rel. McKenzie v.*

BellSouth Telecommunications, Inc., No.3:94-cv-730, app. at 48a, (E.D. Tenn. February 23, 1996) (Memorandum Order Granting BellSouth's Motion to Dismiss) (hereinafter referred to as the Dismissal Order). McKenzie was placed upon permanent disability leave after she suffered two emotional breakdowns. *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, app. at 4a, 123 F.3d 935, 937 (6th Cir. 1997).

As acknowledged by McKenzie in her certiorari petition brief at page 6, two lawsuits had been filed against BellSouth prior to McKenzie bringing her claims of fraud to the attention of the United States. One of the lawsuits, the *Dorris* action, filed in Tennessee state court and removed to the United States District Court for the Western District of Tennessee, involved South Central Bell. *McKenzie*, app. at 7a, 123 F.3d at 939. The other, the *Falsetti* action, filed in the United States District Court for the Northern District of Florida, involved Southern Bell. *McKenzie*, app. at 8a, 123 F.3d at 939.

Both previously filed lawsuits garnered a great deal of media coverage in newspapers of general circulation. *Id.* McKenzie acknowledged in her complaint that while employed by BellSouth in Tennessee she showed her supervisor a newspaper article concerning the *Falsetti* case filed in Florida. *Id.*

When McKenzie finally filed suit against BellSouth in December of 1994, "large portions of McKenzie's complaint [were] nearly identical to portions of Falsetti's complaint," which had been filed in July of 1991. *Id.* The *Falsetti* action was a False Claims Act *qui tam* action involving federal customers. *Id.* The allegations of the *Dorris* action, while not directly addressing fraud against

federal facilities, were "nearly identical to some of McKenzie's claims." *Id.*, app. at 7a., 123 F.3d at 939.

The United States did not intervene in McKenzie's *qui tam* action. *McKenzie*, app. at 4a n.2, 123 F.3d at 937 n.2. Nor did the United States intervene in the *Falsetti* action where the attorney for the United States Department of Justice, Civil Fraud Section, had been deposed. Dismissal Order, app. at 40a. The Department of Justice attorney testified in deposition that he had become aware of the allegations of fraudulent conduct by BellSouth as early as the spring of 1990 through meetings with the attorney representing Falsetti. *Id.*

In the Dismissal Order of the United States District Court for the Eastern District of Tennessee, Judge James H. Jarvis, found McKenzie's "allegations regarding alleged falsification of government records is based upon 'information and belief' as opposed to knowledge which is 'direct and independent.' In fact, McKenzie does not allege even one instance in which a falsified record went to the government, upon which the government relied in paying funds to BellSouth. Likewise, she does not allege one instance in which the government requested a refund [as required under the applicable Tennessee tariff], which was denied. Ms. McKenzie has no personal knowledge of the specific time, place, or content of any fraud perpetrated upon the United States Government." Dismissal Order, app. at 58a-59a. The district court also found McKenzie's claims to "appear to be 'derived from' the allegations of the Falsetti complaint. . . . McKenzie alleges that she 'showed Ms. Crum [her supervisor] a copy of the newspaper article about a similar fraud being perpetrated by the telephone company in Florida." *Id.*, app. at 52a-53a. The district court concluded, "this lawsuit is in part 'derived from' the Falsetti case and,

thus, in the court's opinion, is somewhat parasitic." *Id.*, app. at 53a.

The United States Court of Appeals for the Sixth Circuit, affirmed in part the Dismissal Order. (The court of appeals reversed the district court's dismissal of the McKenzie's retaliation claim, which is not at issue in the certiorari petition.) The panel found "[i]t is clear that McKenzie's allegations were publicly disclosed prior to the filing of her suit through the *Falsetti* and *Dorris* cases and the publicity related to them." *McKenzie*, app. at 9a, 123 F.3d at 940. The court of appeals concluded McKenzie's claims were "based upon" these public disclosures, observing "They are not merely similar to the allegations in *Dorris* and *Falsetti*; portions of McKenzie's complaint are virtually identical to the complaint in *Falsetti*, and McKenzie admits, in her complaint, awareness of the *Falsetti* allegations. In addition, her allegations are the same as some of the allegations made by Dorris and reported in the Tennessee newspapers." *Id.*, app. at 11a, 123 F.3d at 940-41. Finally, the court of appeals found McKenzie's "complaint was filed three years after *Falsetti* and well after the allegations in *Dorris* were made public. She was not the first to inform the government of the alleged fraud being perpetrated by BellSouth . . . . McKenzie is not a 'true whistleblower' and cannot benefit as if she were one." *Id.* at 16a-17a, 123 F.3d at 943.

REASONS NOT TO GRANT THE WRIT OF CERTIORARI

A. There is No Important Matter at Issue

As recently recognized by this Court, the relator's interest in a *qui tam* action and those of the United States Government do not necessarily coincide. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S.Ct. 1871, 1877 n.5 (1997). "As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are primarily motivated by prospects of monetary reward rather than the public good." *Id.* at 1877.

At issue in McKenzie's case is whether the district court had jurisdiction over her *qui tam* action to recover a portion of an award that would otherwise go to the United States Government. In this case, the facts are undisputed that the Government, in particular, the United States Department of Justice, Civil Fraud Division, had been aware of the alleged fraud for more than four years before McKenzie's counsel went to the United States District Attorney for the Eastern District of Tennessee.

The court of appeals' opinion affirming in part the Dismissal Order did nothing to decrease the incentive of a potential *qui tam* relator to bring to the attention of the Government an alleged fraud being perpetrated upon it. If anything, the court of appeals' opinion strengthens the incentive for an individual having knowledge of a fraud to bring it to light immediately and directly to the Government.

Under the Sixth Circuit's analysis in *McKenzie*, the jurisdictional requirements of the False Claims Act were interpreted to preclude individuals, except original sources, "who base any part of their allegations on publicly disclosed

information from bringing a qui tam action." *McKenzie*, app. at 11a, 123 F.3d at 940; *see United States ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993). There is no important governmental interest in allowing a *qui tam* action to proceed under these circumstances. Recently, the United States stated the Government's position in this regard. Unless the relator is an original source, "qui tam lawsuits brought in these circumstances – after a public disclosure has occurred showing that the government is itself taking action or is capable of taking action – are likely to bring the Treasury nothing more than what government prosecutors would have recovered on their own initiative, and they divert a portion of that recovery unnecessarily from the Treasury to private hands." Amicus Brief of the United States at n.12, 1997 WL 744847 (filed December 31, 1996), *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S.Ct. 1871 (1997).

Furthermore, the Sixth Circuit's analysis of the term "original source" is also consistent with encouraging a potential relator to report fraud on the Government at the earliest possible opportunity. The court of appeals found "it difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain." *McKenzie*, app. at 14a, 123 F.3d at 942. The Sixth Circuit went on: "The government has the clearest interest in the information and the FCA was designed to give whistleblowers the incentive to provide the government with such information. Furthermore, this interpretation protects the 'true whistleblower,' the person who reports fraud to the government before it is publicly disclosed, by allowing her to maintain a qui tam action." *McKenzie*, app. at 16a, 123 F.3d at 943.

Under these circumstances, the only issue in McKenzie's petition is whether the Dismissal Order deprived her a potential share of a recovery that is the Government's, not hers, to pursue. This is purely a private matter of a wealth transfer from the public fisc to McKenzie that does not involve any important matter over which this Court should exercise its jurisdiction by way of certiorari.

B. McKenzie's Facts Make this Case an Inappropriate Vehicle to Resolve the Conflict among the United States Courts of Appeals

There is a conflict among the United States Courts of Appeals over the precise interpretation of the terms "based upon" under the public disclosure subsection and the "original source" subsection of the False Claims Act. 31 U.S.C. δ 3730(e)(4)(A)-(B) (1994).

The United States Court of Appeals for the Fourth Circuit interprets the phrase "based upon" in subsection 3730(e)(4)(A) to mean "derived from" while the other United States Courts of Appeals that have addressed the issue have generally interpreted it to mean "supported by" or "similar to." *Compare United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) with *McKenzie*, app. at 9a-11a, 123 F.3d at 940-41; *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F. 3d 1000, 1006 (10th Cir. 1996); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 571 (10th Cir. 1995); *Cooper v. Blue Cross and Blue Shield*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990). *See also United States*

ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 688-89 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3259 (U.S. October 6, 1997)

However, this conflict would not affect the outcome of the dismissal of McKenzie's case for lack of jurisdiction. The district court's Dismissal Order found McKenzie's *qui tam* claims to be both "supported by" and "derived from" from the *Falsetti qui tam* action which had been filed three years before she filed her action. *Supra* at 7; Dismissal Order, app. at 52a-53a. These findings were left undisturbed by the court of appeals.

The same is true with respect to the conflict among the United States Courts of Appeals over the interpretation of the term "original source" in subsection 3730(e)(4)(B). The district court's Dismissal Order analyzed McKenzie's factual allegations from the perspective of the varying interpretations of that term. The district court found McKenzie failed to meet the requirement that she be an original source, regardless of which precise interpretation was applied, because her knowledge was not direct and independent. *Supra* at 7; Dismissal Order, app. at 58a-59a.

On appeal, the Sixth Circuit did not disturb these findings. The court of appeals added that McKenzie was not an original source within the meaning of that term as interpreted by the United Stated Court of Appeals for the District of Columbia Circuit in *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3259 (U.S. October 6, 1997), a case decided after the Dismissal Order was entered. *McKenzie*, app. at 13a-17a, 123 F.3d at 942-43.

Regardless of the interpretation of the controverted terms, "based upon" and "original source," the outcome in

McKenzie's case would be the same. The district court was without jurisdiction over her *qui tam* action. Under these circumstances, it would be improvident for the petition for a writ of certiorari to be granted.

C. The Sixth Circuit's Interpretation of Subsections 3730(e)(4)(A)-(B) is the Correct Result

The Report of the House of Representatives to the 1986 Amendments to the False Claims Act succinctly set forth the purpose of the qui tam provisions of the Act. "The purpose of the qui tam provisions of the FCA is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward." H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986), *quoted* in *McKenzie*, app. at 15a, 123 F.3d at 942-43.

Despite the conflict among the United States Courts of Appeal, this Court should not grant the petition because the Sixth Circuit's opinion in *McKenzie* reached the correct result for the correct reason. The Sixth Circuit thoroughly explored and critically analyzed the differing viewpoints of the courts of appeals. The Sixth Circuit's guiding beacon was the underlying purpose of the *qui tam* provisions of the False Claims Act, as reflected in the Congressional Record and the history of the Act.

The Sixth Circuit disagreed with the Fourth Circuit's interpretation of "based upon" because it was not "the most consistent with the FCA's purpose. The jurisdictional requirements were designed to restrict the number of persons who can bring qui tam actions and thereby avoid parasitic actions." *McKenzie*, app. at 10a-11a, 123 F.3d at 940. The Sixth Circuit interpreted "based upon" to mean, "supported by" in order to "effectively preclude individuals who base

any part of their allegations on publicly disclosed information from bringing a qui tam action." *Id.*, app. at 11a, 123 F.3d at 940. In so doing, the Sixth Circuit joined four other United States Courts of Appeals, which had also analyzed and decided the issue. The interpretation of the Second, Sixth, Ninth, Tenth and Eleventh Circuits is the correct one.

The Sixth Circuit adopted the District of Columbia Circuit's interpretation of "original source" in *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3259 (U.S. October 6, 1997). *McKenzie*, app. at 16a, 123 F.3d at 943. In the D.C. Circuit's 1997 decision, an opinion by Judge Wald, the court of appeals held that "an 'original source' must provide the government with the information prior to any public disclosure." *Findley*, 105 F.3d at 690. As the court of appeals explained in *Findley*, the only reading of the statute that accounts for the requirement that an "original source" voluntarily provide information to the Government before filing suit "is one that requires an original source to provide the information to the government prior to any public disclosure." *Id.* at 691.

The Sixth Circuit found the "D.C. Circuit's requirements do more to promote the FCA's mission – to alert the government that a fraud is being perpetrated against it." *McKenzie*, app. at 16a, 123 F.3d at 943. The Sixth Circuit correctly concluded "the individual who sits on the sidelines while others disclose the allegations that form the basis of her complaint should not be able to participate in any monetary award. This would be contrary to the purpose of the statute." *Id.*, app. at 15a-16a, 123 F.3d at 943.

McKenzie was correctly decided. There is no need for this Court to grant the writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

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